Office - Supreme Court, U
FILED
JUL 12 1983
ALEXANDER L. STEVA
CLERK

83-180

NO. _____

IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM 1983

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Petitioner

vs.

JAMES G. WATT, et al., and WALKER RIVER
PAIUTE TRIBE OF NEVADA,
Respondents

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

FOLEY, MC INTOSH & FOLEY
PROFESSIONAL CORPORATION
By ROBERT J. FOLEY
(counsel for service)
By WILLIAM R. FOLEY
1225 Solano Avenue
Albany, CA 94706
Telephone (415) 524-4123

ECHEVERRIA AND OSBORNE,
CHARTERED
By PETER ECHEVERRIA
By NATHAN M. JENKINS
555 South Center Street
Reno, Nevada 89501

Attorneys for Petitioner

QUESTIONS PRESENTED FOR REVIEW

[Rule 21.1(a)]

1. Can the Secretary of the Interior lawfully require Indian consent as a precondition to the processing of an application for a railroad right-of-way across Indian land, created by a federal statute characterized by the Eighth and Tenth (but not by the Ninth) Circuits as an eminent domain statute?

2. Can the Secretary of the Interior lawfully refuse to process an application (for a Congressionally granted railroad or public utility right-of-way across Indian land) because unaccompanied by Indian consent; does that refusal violate

applicable decisions of this Court concerning nondelegation and subdelegation of legislative power, procedural due process, and unlawful amendment of federal statutes by administrative regulation?

3. Does Indian sovereignty make permissible the Secretary's grant of a veto power to an Indian tribe whose property would be subjected to an interstate railroad right-of-way when that right-of-way was granted by Congress?

4. Was the Secretary's failure to provide for standards, findings, and review of Indian consent a violation of procedural due process?

LIST OF PARTIES TO PROCEEDING

[Rule 21.1(b)]

PETITIONER:

SOUTHERN PACIFIC TRANSPORTATION COMPANY, a Delaware corporation (SOUTHERN PACIFIC TRANSPORTATION COMPANY is a wholly owned subsidiary of SOUTHERN PACIFIC COMPANY, a Delaware corporation).

RESPONDENTS:

1. JAMES G. WATT, SECRETARY OF THE INTERIOR.

2. WALKER RIVER PAIUTE TRIBE OF NEVADA.

(Brief Amicus Curiae filed in United States Court of Appeals for the Ninth Circuit in support of Petition for Rehearing en Banc of Southern Pacific Transportation Company by Transwestern Pipeline Company).

TABLE OF CONTENTS
[Rule 21.1(c)]

	Page
Questions Presented for Review	1
List of Parties to Proceeding	3
Table of Authorities	7
Reference to Reports of Opinions Below	15
Statement of Grounds Invoking Jurisdiction	17
Reference to Constitution, Statutes Involved	19
Statement of the Case	21
Argument	
A. Background of Pertinent Statutes and the Consent Regulation	26
1. The 1899 Act	26
2. The 1948 Act	29
3. The Consent Regulation	33

Page

B. Argument 35

1. The Consent Regulation Does Not Apply to an 1899 Act Application 35

2. If the Consent Regulation is Applicable to an 1899 Act Application, the Regulation is Beyond the Scope of the Authority Given the Secretary and is, Therefore, an Unlawful Attempt to Amend the Statute 40

3. If the Consent Regulation is Within the Scope of the Secretary's Authority, Congress has, by Granting such Authority, Unconstitutionally Delegated its Legislative Power to the Secretary 48

4. If the Delegation to the Secretary is Permissible, the Secretary's Subdelegation to the Indian Tribe, of an Uncontrolled Veto Power is Repugnant to Fifth Amendment Due Process Requirements 65

Page

5. Indian Sovereignty Does Not Cure the Subdelegation 67

C. Conclusion 72

Appendices (Index to Appendices) 75

Appendix A i

Appendix B ii

Appendix C vi

Appendix D xi

Appendix E xvii

TABLE OF AUTHORITIES
[Rule 21.1(c)]
CASES

	Page
Baker-Chaput v. Cammett, 406 F. Supp. 1134 (1976).	60
Carlson v. Landon, 342 U.S. 524 (1952).	54
Carter v. Carter Coal Co., 298 U.S. 238 (1935).	58, 59
Cherokee Nation v. Kansas Railway Co., 135 U.S. 641 (1889).	71
Clarke v. Boysen, 39 F.2d 800 (10th Cir. 1930).	27, 41
DeCoteau v. District County Court, 420 U.S. 425 (1975).	28
Environmental Defense Fund v. Ruckelshaus, 439 F.2d 584 (1971).	67
Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973).	63
Eubank v. Richmond, 226 U.S. 137 (1912).	67
Fahey v. Mallonee, 332 U.S. 245 (1947).	54

Page

FEC v. Democratic Senatorial Campaign Comm. 454 U.S. 27 (1981). 63

FMC v. Seatrain Lines, Inc., 411 U.S. 693 (1973). 64

FPC v. New England Power Co., 415 U.S. 345 (1974). 50, 54

Francis v. Francis, 203 U.S. 165 (1906). 46

FTC v. Colgate-Palmolive, 380 U.S. 374 (1964). 64

Hampton & Co. v. United States, 276 U.S. 394 (1928). 54

Hampton v. Mow Sun Wong, 426 U.S. 88 (1975). 55, 59

Holmes v. New York City Housing Auth. 398 F.2d 262 (2d Cir. 1968). 67

Industrial Union Dept. v. American Petrol Inst., 448 U.S. 607 (1980). 54

Kent v. Dulles, 357 U.S. 116 (1958). 46, 47

Morrill v. Jones, 106 U.S. 466 (1882). 46

Page

Morton v. Ruiz,
415 U.S. 199 (1974). 64

National Cable Television
Ass'n v. United States,
415 U.S. 336 (1974). 55

New York State Dept. of Social
Services v. Dublino,
413 U.S. 405 (1973). 63

Nicholas v. Kahn,
389 N.E.2d 1086, (1979). 67

NLRB v. Brown,
380 U.S. 278 (1964). 64

Oliphant v. Suquamish Indian
Tribe, 435 U.S. 191 (1978). 70

Panama Refining Co. v. Ryan,
293 U.S. 388 (1935). 50,51,52

Reliance Electric Co. v.
Emerson Electric Co.,
404 U.S. 418 (1971). 63

Santa Clara Pueblo v. Martinez,
436 U.S. 47 (1978). 71

Schechter Poultry Corp. v.
United States, 295 U.S. 495
(1935). 50,51

	Page
Seattle Trust v. Roberge, 278 U.S. 116 (1928).	67
SEC v. Sloan, 436 U.S. 103 (1978).	64
Skidmore v. Swift & Co., 323 U.S. 134 (1944).	64
Soglin v. Kauffman, 418 F.2d 163 (7th Cir. 1969).	67
Soriano v. United States, 494 F.2d 681 (9th Cir. 1974).	64
Southern Pacific Transportation Co. v. Watt, 700 F.2d 550 (1983).	36,41, 65,68, 71
Sunshine Coal Co. v. Adkins, 310 U.S. 381 (1940).	54
Teamsters v. Daniel, 439 U.S. 551 (1978).	63
United States v. Eaton, 144 U.S. 677 (1891).	46
United States v. Fort Smith & W.R. Co., 195 F.211 (8th Cir. 1912).	41
U.S. v. Mazurie, 419 U.S. 544, (1975).	68,69,70

Page

United States v. Southern Pacific Transportation Co., 543 F.2d 676 (9th Cr. 1976). 21

United States v. United Verde Copper Co., 196 U.S. 207 (1904). 46

United States v. Wheeler, 435 U.S. 313 (1978). 70

Volkswagenwerk v. FMC, 390 U.S. 261 (1968). 64

Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980). 70

REGULATIONS

25 C.F.R. §161.3 (1981). 33

Part 169. 34,35

25 C.F.R. §§169.1-169.28(1982). 34,35

25 C.F.R. §169.3(a). 33

25 C.F.R. §169.18. 34

25 C.F.R. §169.22. 34

25 C.F.R. §169.23. 34,37,45

25 C.F.R. §169.25. 34

25 C.F.R. §169.26. 34

Page

25 C.F.R. §§256.1-256.31 (1951). 37

25 C.F.R §256.3 33,37

STATUTES

Act of 5 August 1882,
ch. 394, 22 Stat. 299. 56

Act of 15 February 1887,
ch. 130, 24 Stat. 402. 56

Act of 30 May 1888,
ch. 336, 25 Stat. 160. 56

Act of 8 May 1890,
ch. 198, 26 Stat. 102. 56

Act of 18 February 1895,
ch. 95, 28 Stat. 665. 56

Act of 6 March 1896,
ch. 42, 29 Stat. 44. 56

Act of 4 June 1898,
ch. 377, 30 Stat. 430. 56

Act of 18 June 1898,
ch. 465, 30 Stat. 475. 56

Act of 2 March 1899, ch. 374,
30 Stat. 990 (codified at
25 U.S.C. §§312-318)
("1899 Act"). passim

	Page
Act of 18 June 1934, ch. 576, 48 Stat. 987 (Indian Reorganization Act; "IRA") (Section 16 codified at 25 U.S.C. §476).	30,31, 32,39
Act of 5 February 1948, ch. 45, 62 Stat. 17 (codified at 25 U.S.C. §§323-328) ("1948 Act").	passim
5 U.S.C. §702.	25
5 U.S.C. §706.	25, 67
25 U.S.C. §312.	28,43
25 U.S.C. §314.	41,43,44
25 U.S.C. §317.	42,44,45
25 U.S.C. §324.	30,57
25 U.S.C. §1331.	25
28 U.S.C. §2201.	25
28 U.S.C. §2202.	25

OTHER AUTHORITIES

Bill to Grant Indians Living Under Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise: Hearings on

	Page
S-2755 Before the Committee on Indian Affairs, U.S. Senate, 73rd. Cong., 2nd Sess. 31 (1934).	31
Excerpt of Memo, Sol. I.D. 8 July 1936.	33
F. Cohen, Handbook of Federal Indian Law, 122 (Univ. New Mexico ed. undated).	71,72
47 F.R. 13327.	33
House Report No. 1896 from the House Committee on Indian Affairs, 55th Congress, 3d. Sess. (1899).	27
H. Rep. No. 91-78, 91st Cong. 1st Sess. (1969) "Disposal of Rights in Tribal Lands Without Tribal Consent".	38
K. Davis, Administrative Law Treatise, (1978) (2d. Ed.).	50,54, 57,60
70 Mich. L. Rev. 955 (April 1972).	72
2 U.S. Code Cong. Serv. 1036 (1948).	29

REFERENCE TO REPORTS OF
OPINIONS DELIVERED BELOW
[Rule 21.1(d)]

1. ADMINISTRATIVE AGENCY

A. Decision of the Assistant Secretary of the Interior for Indian Affairs, dated 19 June 1978, attached as Exhibit "A" to complaint filed by Southern Pacific Transportation Company in the United States District Court for the District of Nevada.

Included herein at Appendix B.

2. DISTRICT COURT

A. Summary Judgment, entered 14 August 1980, to which is appended Order Granting Summary Judgment, entered 25 July 1980.

B. Amended Summary Judgment entered 28 August 1980.

Included herein at Appendix B.

3. COURT OF APPEALS

A. Decision of the Court of Appeals for the Ninth Circuit, filed 1 March 1983; reported at 700 F.2d 550 (1983).

Included herein at Appendix A.

STATEMENT OF GROUNDS ON WHICH
JURISDICTION OF THIS COURT IS INVOKED
[Rule 21.1(e)]

(i) The judgment of the Court of Appeals sought to be reviewed herein was dated and entered on 1 March 1983.

(ii) A Petition for Rehearing and Suggestion for Rehearing In Banc was filed on 14 March 1983.

The petition for rehearing was denied and the suggestion for rehearing in banc was rejected by Order filed 9 June 1983.

Petitioner filed a Motion for Stay of Mandate on 14 June 1983.

By Order filed 27 June 1983 petitioner's motion for stay of mandate was granted, predicated upon a petition for writ of certiorari being filed in

the office of the clerk of this Court on or before 14 July 1983.

(iii) The statutory provision believed to confer jurisdiction on this Court to review the judgment of the Court of Appeals for the Ninth Circuit is 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED IN THIS CASE

[Rule 21.1(f)]

Pertinent text of the following is set forth in Appendices D and E.

1. United States Constitution

   A. Art. I §8.

   B. Amendment 5.

2. Federal Statutes

   A. 5 U.S.C. §706.

   B. Act of 2 March 1899, ch. 374, 30 Stat. 990 (codified at 25 U.S.C. §§312-318)("1899 Act").

   C. Act of 5 February 1948, ch. 45, 62 Stat. 17 (codified at 25 U.S.C. §§323-328) ("1948 Act").

D. Act of 18 June 1934, ch. 576, 48 Stat. 987 (Indian Reorganization Act; "IRA") (Section 16 codified at 25 U.S.C. §476).

3. Federal Regulations

A. 25 C.F.R. §§256.1-256.31 (1951).

B. 25 C.F.R. §161.3 (1981).

C. 25 C.F.R. §§169.1-169.28 (1982).

STATEMENT OF THE CASE

[Rule 21.1(g), (h)]

SOUTHERN PACIFIC TRANSPORTATION COMPANY (SP) submitted for filing with the Secretary of the Interior (the Secretary) an application to legitimize its Central Nevada railroad right-of-way through the reservation of the Walker River Paiute tribe; the right-of-way had, for technical reasons, been declared invalid in 1976 by the 9th Circuit.[1] The application was prepared and submitted pursuant to an 1899 statute[2] granting rights-of-way through tribal lands to railroads.

---

1. United States v. Southern Pacific Transportation Co., 543 F.2d 676 (9th Cir.1976).

2. Act of 2 March 1899, ch. 374, 30 Stat.990 (codified at 25 U.S.C. §§312-318)("1899 Act").

The right-of-way which SP sought to validate has been in use for over 100 years; it is a part of the only railroad service for Central Nevada shippers and the U.S. munitions facility at Hawthorne. The Secretary refused to file the application, citing lack of tribal consent.

At issue here is the legality and/or applicability of an administrative regulation requiring tribal consent. That consent regulation was enacted to regulate another right-of-way statute governing administrative grants of rights-of-way. We urge it was improperly applied by the Secretary to the Congressional grant of the 1899 Act and other special right-of-way statutes. The regulation, as applied

by the Secretary, has the nationwide effect of hindering and defeating the creation or renewal of utility easements (railroads, pipelines, electrical and telephone transmission service) through Indian reservations absent exorbitant monetary tribute or other demands of the tribes. The 1899 Act and the special rights-of-way statutes contain no tribal consent requirement. In seeking tribal consent, SP found the price unreasonable and subject to no Secretarial supervision, review or guidelines. After exhausting its administrative remedies, SP filed suit to compel the Secretary to accept and process the application without prior tribal consent. The District Court for the Northern District of Nevada,

on cross motions for summary judgment, ruled that tribal consent is not required as a condition precedent to acquistion of a right-of-way under the 1899 Act. The tribe and the Secretary appealed. The 9th Circuit reversed. A petition for rehearing was timely filed and denied.

The decision, if allowed to stand, may lead to the District Court granting a petition for ejectment in a companion action, thereby eliminating a segment of the only interstate rail service to Central Nevada and the Hawthorne munitions depot.

The effect of the decision below is to permit the Secretary, without express statutory authority, to subdelegate to an Indian Tribe the legislative

power to impose preconditions beyond those specified in the 1899 Act. Additionally, under a broader view, the decision will grant Indian tribes the ability to frustrate utility operations unless utilities meet tribal demands. The effect of the consent regulation as imposed by the Secretary will be either termination of utility services or increased cost to the consumer.[3]

Federal jurisdiction in the District Court for the Northern District of Nevada was based upon 28 U.S.C. §§1331; 2201, 2202 and 5 U.S.C. §§702, 706.

---

3. See Amicus Curiae Brief of Transwestern Pipeline Company in support of petition for rehearing in banc filed herein with the Court of Appeals for the Ninth Circuit.

ARGUMENT

[Rule 21.1(j)]

A. BACKGROUND OF PERTINENT STATUTES AND THE CONSENT REGULATION

1. The 1899 Act.[1]

The 1899 Act was passed at a time in history when the transcontinental railroad network of this country was being formed. Prior to its passage a special right-of-way bill was utilized with respect to each railroad line as it passed over Indian land. The number of such bills, time demands on the Secretary of the Interior and the Bureau of Indian Affairs for the

---

1. Act of 2 March 1899, ch. 374, 30 Stat. 990 (codified at 25 U.S.C. §§312-318 ("the Act").

consideration of such special bills, and lack of uniformity in the substance and procedure under such bills necessitated a general statute providing for railroad rights-of-way over Indian land. The 1899 Act was passed to cure these problems, and to promote the growth and expansion of an interstate railroad system in an expanding nation.[2] It was not passed to benefit or protect Indians.[3]

---

2. Clarke v. Boysen, 39 F.2d 800, 814 (10th Cir. 1930).

3. See House Report No. 1896 from the House Committee on Indian Affairs, 55th Congress, 3d. Sess. (1899), which accompanied H.R. 11868 (later enacted as the 1899 Act). It is to be noted that this legislative history of the 1899 Act contains no indication that the purpose for its passage was the protection of Indian interests, a misconception utilized by the Ninth Circuit as the basis for "liberal" construction of the 1899 Act

The 1899 Act, by its express language[4] is a grant directly from Congress of a right-of-way over Indian land to any railroad company complying with the requirements of the Act and

---

3. (continued)
"in favor of the Indians". To the contrary, H.R. 1896 states that the statute as framed (i.e., with no reference to any requirement of Indian consent, but containing provision for just compensation to be determined and paid) was fully protective of Indian rights and interests.

Even if liberal construction in favor of the Indians were proper, the rule is one of statutory construction, applicable in case of ambiguity; not a license to disregard clear expressions of Congressional intent. See DeCoteau v. District County Court, 420 U.S. 425, 447 (1975).

4. The 1899 Act provides, at 25 U.S.C. 312:

"A right of way . . . [through Indian land] . . . is hereby granted to any railroad. . . ." (Emphasis added)

with the implementing rules and regulations prescribed by the Secretary.[5]

The Act has been characterized by the Eighth and Tenth Circuits as a condemnation statute; the Act itself uses the phrase: "the property sought to be condemned"; here, the Ninth Circuit has held otherwise.

2. The 1948 Act

The 1948 Act[6] was enacted to simplify and make uniform the provisions by which the Secretary (as opposed to Congress) could grant rights-of-way over Indian land.[7] Rights-of-way

5. Secretary of the Interior ("Secretary").

6. Act of 5 February 1948, ch. 45, 62 Stat 17 (codified at 25 U.S.C. §§ 323-328) ("1948 Act").

7. See 2 U.S. Code Cong. Serv. 1036 (1948).

granted under the 1948 Act could be for any purpose, whether solely of local concern and effect or otherwise. The 1899 Act, to the contrary, is limited to railroad, telegraph, and telephone rights-of-way.

The 1948 Act contains a provision[8] prohibiting the Secretary from granting a right-of-way under the 1948 Act across lands of a tribe organized under the IRA[9] without the consent of the tribe. The consent requirement was included in the 1948 Act to continue protection provided for in section 16 of the IRA,

---

8. 25 U.S.C. §324.

9. Act of 18 June 1934, ch. 576, 48 Stat. 987 (Indian Reorganization Act; "IRA").

to prevent abusive disposition of Indian lands by discretionary administrative actions of the government.[10]

---

10. Section 16 of the IRA provides that the constitution adopted by IRA tribes shall vest in the tribe the right and power to prevent the sale or disposition of tribal land without the consent of the tribe. It is obvious that neither section 16 of the IRA nor the 1948 Act's consent requirement were intended to limit the ability of Congress or officers of the government acting pursuant to special mandate of Congress, to create rights-of-way across Indian lands.

    See: Bill to Grant Indians Living Under Tutelage the Freedom to Organize for Purposes of Local Self-Government and Economic Enterprise: Hearings on S-2755 Before the Committee on Indian Affairs, U.S. Senate, 73rd Cong., 2nd Sess. 31 (1934) where then Commission of Indian Affairs, John Collier, referring to a bill which provided the impetus for the IRA, explained the need to curb such administrative abuse:

    "This bill takes its origin from the absolute necessity of in some way correcting the trend of the allotment, stopping the loss of the remaining Indian lands,

It was not intended to and should not apply where the right-of-way, as in the 1899 Act, is created by Congress.

---

10. (continued)
making it possible to bring the remaining lands into usable blocks so that they can be effectively and economically operated. This is the purpose of this bill.

* * * *

Paralleling this basic purpose is another purpose just as basic. The bill stands on two legs. At present the Indian Bureau is a czar. It is an autocrat. It is an autocrat checked here and there by enactments of Congress; but, in the main, Congress has delegated to the Indian Office plenary control over Indian matters. It is a highly centralized autocratic absolutism. Furthermore, it is a bureaucratic absolutism.

The result is that if the Indians all over the country have had any rights it has been by the whim of the Indian office or the Secretary of the Interior."

Contemporary administrative construction of the IRA was in accord with this view:

"It is true that the United States in its sovereign capacity may condemn tribal land for certain purposes and may even

3. The Consent Regulation

The consent regulation provides in pertinent part:

> "No right-of-way shall be granted over and across any tribal land . . . without the prior written consent of the tribe."11

---

10. (continued)
appropriate tribal land by act of Congress subject to constitutional requirements of compensation. But the rights and powers with respect to tribal property granted by the Constitution . . . of the . . . Tribes are effective against officers of the United States not acting under direct mandate of Congress. Indeed, unless officers of the Department can be restrained by the Tribe from disposing of tribal property, all meaning has vanished from the provision in section 16 of the Indian Reorganization Act. . . ." (Emphasis added)

(Excerpt of Memo, Sol. I.D. 8 July 1936); See also 70 Mich. L. Rev. 955, 966-969 (April 1972).

11. The consent regulation was first promulgated at 25 C.F.R. §256.3 in 1951 (more than fifty years after passage of the 1899 Act). It was later found at 25 C.F.R. §161.3(a) and, on 30 March 1982, was redesignated as 25 C.F.R. §169.3(a) (47 F.R. 13327).

It is found in Part 169 of Title 25 of the Code of Federal Regulations, which Part deals generally with the subject of rights-of-way over Indian lands.[12] The consent regulation is general in its terms, and does not specify any particular type or statutory source of right-of-way to which it is intended to apply.

Section 169.23 of the right-of-way regulations, however, applies specifically to railroad rights-of-way granted under the 1899 Act and states that rights-of-way granted under that Act shall be subject to the provisions of Section 169.23 "as well as other pertinent sections" of Part 169. It

---

12. See, e.g., uses described at 25 C.F.R. §§169.18, 169.22. 169.25, 169.26.

is the position of SP that the consent regulation is not pertinent to rights-of-way granted by Congress under the 1899 Act,[13] is not among the "other pertinent sections" of Part 169, and cannot apply to SP's application.

B. ARGUMENT

1. THE CONSENT REGULATION DOES NOT APPLY TO AN 1899 ACT APPLICATION

The Secretary refused to process SP's application because it was unaccompanied by tribal consent. The Court of Appeals here decided that Congress had authorized the Secretary to establish preconditions inconsistent

---

13. (as opposed to rights-of-way sought, e.g., under the 1948 Act, where the Secretary makes the initial determination as to whether to grant such right-of-way).

with and beyond those specified in the 1899 Act.[14]

The consent regulation was never intended to and does not apply to railroad right-of-way applications under the 1899 Act, as demonstrated by the following points:

a. For over fifty (50) years of operation of the 1899 Act, no consent regulation existed;[15]

b. The consent regulation was promulgated after passage of the 1948 Act;

c. The 1948 Act is (but the 1899 Act is not) cited by the regulations

14. Southern Pacific Transportation Co. v. Watt, 700 F.2d 550, 552 (9th Cir. 1983).

15. See footnote 11, supra.

themselves as the statutory authority for the consent regulation;[16]

d. The present regulations recognize that the 1899 Act and the 1948 Act serve as alternate sources for the procurement of the same type of right-of-way;[17]

e. The Secretary's application of the consent regulation to an

---

16. The stated authority for adoption of 25 C.F.R. §§256.1 - 256.31 in 1951 designates specific statutes which included the 1948 Act but did not include the 1899 Act. The consent regulation itself [§256.3(c) in 1951] expressly states (footnote 1) that it was taken from the 1948 Act.

17. 25 C.F.R. §169.23(a) (as of 1 April 1982) recites, in substance: 1) that the 1899 Act authorizes grants of railroad rights-of-way; 2) that rights-of-way granted under the 1899 Act shall be subject to the provisions of §169.23; 3) generally, rights-of-way granted under the 1948 Act for railroad purposes shall also be subject to the provisions of 169.23.

1899 Act right-of-way application is not, we submit, based upon his belief that the regulation was ever intended to apply under the 1899 Act. Rather, it is because the Secretary, for reasons of self-convenience, has adopted a policy whereby he has decided to ignore the existence of the 1899 Act and its Congressional mandate, in favor of processing all right-of-way applications as if they were directed to his administrative discretion under the 1948 Act;[18]

f. The consent regulation has no purpose in an 1899 Act setting because the protection from administra-

---

18. H. Rep. No. 91-78, 91st Cong. 1st Sess. (1969) "Disposal of Rights in Tribal Lands Without Tribal Consent", at pages 22 and 24:

tive abuse which the IRA, the 1948 Act, and the consent regulation were intended to protect against, is inappropriate and unnecessary where (as under the 1899 Act) Congress itself has determined that the right-of-way described in the 1899 Act should be granted.

This Court may dispose of this case by holding that the consent regulation does not apply to a railroad right-of-way application made under the 1899

---

18. (continued)

> "Although the 1948 Act did not repeal other right-of-way acts, its practical effect was to eliminate the necessity and desireability of using such acts. . . ."
>
> . . . .
>
> "It is also a matter of policy that all Indian rights-of-way will be granted under the 1948 Act. This, we believe, will greatly simplify and standardize the right-of-way procedures."

Act and that the Secretary's refusal to process such application based upon lack of tribal consent was improper.

2. IF THE CONSENT REGULATION IS APPLICABLE TO AN 1899 ACT APPLICATION, THE REGULATION IS BEYOND THE SCOPE OF THE AUTHORITY GIVEN THE SECRETARY AND IS, THEREFORE, AN UNLAWFUL ATTEMPT TO AMEND THE STATUTE

Assuming, arguendo, that the consent regulation applies to an 1899 Act application, the regulation is beyond the scope of the Secretary's authority, and is invalid because:

a. The addition of a tribal consent condition is improper where, as here, the statute is in the nature of an eminent domain statute, providing for a taking of property for a public purpose upon payment of just compensation.

The district court in this action, The Eighth Circuit[19] and the Tenth Circuit[20] have all characterized the 1899 Act as a condemnation statute. The 1899 Act itself uses the phrase "the property sought to be condemned."[21]

The Court of Appeals recognized that its decision that the 1899 Act vested the Secretary with authority to require tribal consent was necessarily inconsistent with the view that the 1899 Act was an eminent domain statute.[22]

---

19. United States v. Fort Smith & W.R. Co., 195 F.211 (8th Cir. 1912).

20. Clarke v. Boysen, 39 F. 2d 800 (10th Cir. 1930).

21. 25 U.S.C. §314.

22. 700 F. 2d. at 554. The court acknowledged the definition of eminent domain as the power of the sovereign to take property for public use without the owner's consent.

The decision of the Court of Appeals in this case is in conflict with the opinions of the Eighth and Tenth Circuits characterizing the 1899 Act as a condemnation statute. This conflict should be resolved by this Court.

b. The 1899 Act authorizes the Secretary to make "all needful rules and regulations, not inconsistent herewith, for the proper execution and carrying into effect of all the provisions of this act."[23]

By enacting the 1899 Act, Congress decided that railroads with the intent and ability to construct a railroad line with facilities for the public

23. 25 U.S.C. §317.

convenience should be (and were) granted rights-of-way,[24] conditioned upon payment of just compensation to the Indians for the right-of-way taken and damages caused.[25]

By the consent regulation, the Secretary has decided that regardless of the railroad's intent and ability to meet these requirements of Congress, no such right-of-way may be granted unless the Indians consent to it.

Not only is the tribal consent condition a requirement beyond those specified in the Act, it is inconsistent with the concept of the Congressional grant upon payment of just compensation. The consent regulation,

24. 25 U.S.C. §312.

25. 25 U.S.C. §314.

being "inconsistent with" the statute itself, is beyond the scope of regulation permitted by 25 U.S.C. §317 and is therefore invalid.

c. The Secretary's authority is to promulgate regulations which are necessary for the implementation of the rather specific policy dictated by Congress in the 1899 Act. That policy not only says nothing about the consent of the Indians being a condition to the grant, it contemplates objection by the Indians and deals with the problem by setting forth the means by which just compensation will be determined and paid.[26] The detailed provisions of the Act implicitly limit the

26. 25 U.S.C. §314.

scope of the Secretary's rulemaking.[27] The consent regulation does not "carry into effect" any provision of the 1899 Act.[28]

d. The Secretary's attempt to limit the benefits of the statute to only those railroads willing to pay the price of Indian consent is an invalid attempt to rewrite the statute by adding a requirement Congress did not prescribe. Previous attempts by the executive branch of government to usurp the powers reserved to the legislative branch have been invali-

27. The Secretary has promulgated a regulation implementing the policy of the 1899 Act [25 C.F.R. 169.23 (1 April 1982)].

28. See 25 U.S.C. §317.

dated by this Court;[29] so should this regulation when applied to the 1899 Act.

e. In the briefs submitted to the Court of Appeals, the Tribe argued that the Secretary, under the 1899 Act, had "unfettered authority to establish grant preconditions in addition to those established by the Act's provisions."[30]

In Kent v. Dulles,[31] this Court avoided serious questions of unconstitutional delegation of the power of

29. Morrill v. Jones, 106 U.S. 466 (1882); United States v. Eaton, 144 U.S. 677, 687 (1891); United States v. United Verde Copper Co., 196 U.S. 207, 215 (1904); Francis v. Francis, 203 U.S. 165 (1906).

30. Page 8 of Tribe's brief to Court of Appeals for the Ninth Circuit.

31. 357 U.S. 116 (1958).

Congress to the executive branch by holding that Congress had not, as was there contended, given the Secretary of State unbridled discretion to grant or withhold passports for any reason he might choose.

The right of exit from the country, considered in Kent, and the free flow of interstate commerce in this case, are matters which are constitutionally committed to the law making functions of Congress. Congress has not, in explicit terms, made any provision for Indian consent, and has provided for the granting of rights-of-way without consent. This Court should not attribute to Congress an intent to permit the Secretary unchecked discretion to add conditions to the statutory grant.

A holding, on any of the above grounds, that the consent regulation was invalid as being beyond the scope of the Secretary's authority under the 1899 Act, will dispose of this case without the necessity of reaching the constitutional issues raised below.

3. IF THE CONSENT REGULATION IS WITHIN THE SCOPE OF THE SECRETARY'S AUTHORITY, CONGRESS HAS, BY GRANTING SUCH AUTHORITY, UNCONSTITUTIONALLY DELEGATED ITS LEGISLATIVE POWER TO THE SECRETARY

The Court of Appeals in this case found it reasonable to conclude that where Congress, in the 1899 Act said:

> "A right-of-way . . . is hereby granted to any railroad company which shall comply with [this Act and the regulations prescribed hereunder]"

that what Congress meant was that the Secretary should take it upon himself to decide that the right-of-way so granted by Congress should be withheld if the Indians, for whatever reason, did not care to have the right-of-way exist.

The Court ignored SP's argument that such an interpretation attributed to Congress an unconstitutional delegation of the legislative power of Congress. Except to the extent of its discussion concerning subdelegation of authority from the Secretary to the Indians (discussed infra) the Court of Appeals did not discuss the issue.

Perhaps the Court of Appeals agreed with observations by members of this Court and legal commentators to

the effect that unconstitutional Congressional delegations found in Panama Refining Co. v. Ryan, 293 U.S. 388 (1935), and Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) are a thing of the past.[32]

We believe that the principle of unconstitutional delegation of authority not only has remaining vitality, but is applicable in this case. When applied, it will be seen that if Congress did grant such unbridled power to rewrite the statute, an unconstitutional delegation would have been made. Such a

---

32. See FPC v. New England Power Co., 415 U.S. 345, 352, 353 f.n. 1; 2 K. Davis, Administrative Law Treatise, §3.2 (1978) (2d. Ed.).

finding, we urge, can be avoided by properly interpreting the 1899 Act as not granting such authority to the Secretary.

In the approximate half century since Panama and Schechter, supra, unconstitutional delegation of legislative power has been suggested to embody different principles. We believe the following to constitute some of the more important concepts. Tested under any of the principles, the purported delegation in this case fails to pass muster:

a) Absence of Declared Congressional Policy and Standards for Action.

In Panama, this Court established criteria for the lawful delegation of

legislative power. The Court looked to determine whether Congress had: 1) declared a policy with respect to the subject of the legislation; 2) set up a standard for the action of the delegatee of the power; and 3) required any finding of fact by the delegatee as a condition to his exercise of the power. Finding none of these, this Court declared the "unfettered discretion" sought to be conferred on the President was an unconstitutional delegation of legislative power.[33]

In the present case, the 1899 Act contains no statement of policy concerning either Indian preconsent or the

33. 293 U.S. at 415.

imposition of any preconditions to the grant which are not specified in the Act itself. Also, there are no standards to govern the Secretary's exercise of his discretion imposing additional conditions generally or Indian consent specifically. Finally, no finding of fact is required before these additional conditions may be imposed.

By this test the action attributed to Congress (authorizing the Secretary to add requirements not specified in the Act, such as Indian consent) would fail.

b) Degree of Certainty as to the Expressed Will of Congress.

It is proper to find that legislative power has been lawfully delegated

when it is unmistakably clear that Congress intended to delegate the power. Congress has neither the time nor the expertise to legislate meaningful standards in many areas of federal legislation.[34] However this Court has not hesitated to strike down agency attempts to exert broad power when it was not clear that Congress intended such power to exist.[35]

34. See, e.g., discussion in 1 K Davis, Administrative Law Treatise, §3.3 (1978) (2d. Ed.); Sunshine Coal Co. v. Adkins, 310 U.S. 381, 398 (1940); Industrial Union Dept. v. American Petrol Inst., 448 U.S. 607, 674-675 (1980) (Rehnquist, J., concurring); Hampton & Co. v. United States, 276 U.S. 394, 406-408 (1928).

35. Compare Hampton & Co. v. United States, 276 U.S. 394 (1928); Fahey v. Mallonee, 332 U.S. 245 (1947); and Carlson v. Landon, 342 U.S. 524 (1952) (clear manifestation of Congressional intent to grant agency discretionary power - delegation upheld) with FPC v. New England Power Co., 415

Under this test, the 1899 Act does not permit any interpretation that Congress intended that the Secretary could impose conditions which defeat rather than implement the statute. The legislative history of the 1899 Act does not indicate that Congress ever considered a tribal consent condition. When Congress, prior to enactment of the 1899 Act, passed special statutes for railroad construction it sometimes made such grants subject to Indian consent. It

35. (continued)
U.S. 345 (1974), National Cable Television Ass'n v. United States, 415 U.S. 336 (1974), and Hampton v. Mow Sun Wong, 426 U.S. 88 (1975) (unclear manifestation of Congressional intent, agency discretionary power held improperly exercised although different result indicated if Congressional determination were clear).

had no difficulty expressing its intent.[36] The 1948 Act is an example of a situation where Congress believed an Indian consent condition should exist (i.e., where the decision to create a right-of-way was to be made, in the first instance, by administrative decision of the Secretary, rather than by Congressional determination as in the 1899 Act). Accordingly, Congress included a consent requirement in the

36. Compare Act of 5 August 1882, ch. 394, 22 Stat. 299; Act of 30 May 1888, ch. 336, 25 Stat. 160; Act of 8 May 1890, ch. 198, 26 Stat. 102, and Act of 18 February 1895, ch. 95, 28 Stat. 665 (Indian consent required), with Act of 15 February 1887, ch. 130, 24 Stat. 402; Act of 6 March 1896, ch. 42, 29 Stat. 44; Act of 4 June 1898, ch. 377, 30 Stat. 430; and Act of 18 June 1898, ch. 465, 30 Stat. 475 (no Indian consent required - in the nature of condemnation statutes).

1948 Act.[37] The absence of a clear expression of Congressional intent, that Indian consent be either required or permitted as a condition to the 1899 Act right-of-way grant, compels the conclusion that no such condition is permissible in this case.

c) Safeguards Against Arbitrariness.

It may be that this Court should acknowledge that one of the basic purposes behind the nondelegation doctrine is that administrators should not have unguided and uncontrolled discretionary power to govern as they see fit.[38] That acknowledgment might

37. 25 U.S.C. §324.

38. K. Davis, Administrative Law Treatise, §§3.15, 7.26 (1978)(2d. Ed.).

be accompanied by recognition that Congressional delegation of legislative power is a necessity of modern government; protection of those persons affected by the administrative exercise of that power must be assured; assurance would occur with the requirement that a total package of standards and safeguards (supplied either by the legislative body or the administrative agency) provide protection against power being exercised arbitrarily. This view is based upon the concepts of procedural due process.

The interrelationship between unconstitutional delegation of legislative power and due process has been recognized by this Court. In Carter v.

Carter Coal Co.[39] the attempted delegation of legislative power was found to be so obnoxious and arbitrary as to constitute a denial of Fifth Amendment due process protection.

In Hampton v. Mow Sun Wong,[40] Justice Rehnquist, in dissent, charged the Court with deciding, on due process grounds, what was essentially a question of Congressional delegation of legislative power to an administrative agency.[41]

Professor Davis observes that a trend of authority is developing which recognizes that the presence or absence of safeguards and/or standards designed

39. 298 U.S. 238, 311-312 (1935).

40. 426 U.S. 88 (1975).

41. See 426 U.S. at 117, 119-123.

to protect against arbitrariness should be the constitutional criterion for the propriety of delegations of legislative power:[42]

> "The non-delegation doctrine was used over a period of four or five decades to require statutory standards; now that the nondelegation doctrine has largely failed, courts may substitute a requirement of administrative standards or rules for the former requirement of statutory standards." 2 K. Davis, Administrative Law Treatise, §7.26, page 131 (1978)(2d. Ed.).

It can be seen here that traditional concepts of fundamental fairness are totally absent from the procedure to

---

42. See discussion and cases at 1 K. Davis, Administrative Law Treatise, §3.15 (1978) (2d. Ed.) and 1982 supplement §3.15. It has been held that due process is lacking when the administrative agency fails to articulate, in writing, objective ascertainable standards that govern the exercise of its discretion. Baker-Chaput v. Cammett, 406 F.Supp. 1134 (1976).

which SP has been subjected. Neither the 1899 Act itself nor its legislative history mention Indian consent as a condition to the right-of-way it provides. No concept of an Indian veto power over rights-of-way created by an 1899 Congress attempting to expedite and simplify the generation of a national railroad network can be found in the statute or its history. No standards were imposed by Congress to guide the Secretary's supposed ability to condition the Congressional grant.

These deficiencies have not been cured by administrative action. The Secretary administered the 1899 Act for more than fifty years without any statutory requirement of Indian consent

and without a regulation requiring such consent. When the consent requirement was promulgated the Secretary gave no notice that it was to be applied to 1899 Act applications. Neither the regulation itself nor the procedures adopted by the Secretary (as evidenced by this case) make any provision for adoption of standards by which Indian consent is to be given or withheld. There is no procedure for review by the Secretary of arbitrary tribal conditions or denial of consent. No opportunity is provided for SP to be heard because the Secretary will not even consider an application unaccompanied by tribal consent. The Secretary nullified the 1899 Act benefits provided by Congress. He granted the Indians

the unfettered ability to prevent the statutory benefits unless the price of their consent is paid.

We urge that the Court of Appeals was wrong to have held that the Secretary had such power and properly exercised it in this case.[43] If Congress had granted such power, the grant would, under any test, violate

43. The Court of Appeals relied upon the "administrative deference" rule in finding the Secretary's interpretation of the 1899 Act to be reasonable. In so doing, the Court ignored these principles:

1. Courts are the final authority on statutory construction, they need not rubber-stamp administrative decisions. FEC v. Democratic Senatorial Campaign Comm. 454 U.S. 27, 32 (1981); Teamsters v. Daniel, 439 U.S. 551, 566 n.20 (1978); See Espinoza v. Farah Mfg. Co., 414 U.S. 86, 94-95 (1973); New York State Dept. of Social Services v. Dublino, 413 U.S. 405, 419-420 (1973); Reliance Electric Co. v. Emerson Electric Co., 404 U.S. 418, 427 (1971).

constitutional principles of nondelegation and due process.

The proper interpretation of the 1899 Act avoids such a holding. The District Court was correct when it held that Indian consent is not required as a condition precedent to acquisition of a right-of-way under the 1899 Act.

---

43. (continued)

2. Courts must reject administrative statutory construction frustrating the mandate of the Act. SEC v. Sloan, 436 U.S. 103, 118 (1978); FTC v. Colgate-Palmolive, 380 U.S. 374, 385 (1964); NLRB v. Brown, 380 U.S. 278, 291 (1964); Volkswagenwerk v. FMC, 390 U.S. 261, 272 (1968); FMC v. Seatrain Lines, Inc., 411 U.S. 693, 745 (1973).

3. The weight to be given to an interpretative regulation depends upon the thoroughness evident in its consideration, the validity of its reasoning, and its consistency with earlier and later pronouncements. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944); Morton v. Ruiz, 415 U.S. 199, 237 (1974); Soriano v.United States, 494 F.2d 681, 683 (9th Cir. 1974).

4. IF THE DELEGATION TO THE SECRETARY IS PERMISSIBLE, THE SECRETARY'S SUBDELEGATION TO THE INDIAN TRIBE, OF AN UNCONTROLLED VETO POWER IS REPUGNANT TO FIFTH AMENDMENT DUE PROCESS REQUIREMENTS.

Even if Congress is found to have lawfully delegated to the Secretary an ability to add conditions beyond those specified in the 1899 Act, the Secretary cannot lawfully delegate that power to the Tribe.

The Court of Appeals justified the subdelegation because the regulation did not relinquish to the tribe the final authority to approve; it merely delegated a power to disapprove.[44] The Court did not speak to the fact

44. 700 F.2d at 556.

that the Secretary, under this procedure, will not process an application or otherwise implement the statute unless the Indians decide that he may. By withholding their consent the tribe prevents the effectuation of the Congressional plan. The Secretary will not even inquire into the reasons for their action.

The power which the Secretary has granted the Indians knows no boundaries. The Secretary has adopted no standards by which Indian consent is to be given or withheld. He has provided no guidelines or standards to enable himself or this Court to determine whether the withholding of Indian consent is based upon arbitrary exercise of Indian discretion. Moreover, no

review of the exercise of that discretion is provided for.[45]

SP contends that the Secretary's action constitutes a subdelegation violative of due process[46] and requiring review and correction under 5 U.S.C. §706(2)(A), (B), and/or (C).

5. INDIAN SOVEREIGNTY DOES NOT CURE THE SUBDELEGATION.

The Court of Appeals found justification for the Secretary's subdelegation to the Indians in this Court's statement

45. See Nicholas v. Kahn, 389 N.E.2d 1086, 1091 (1979); Holmes v. New York City Housing Auth., 398 F.2d 262 (2d Cir. 1968); Soglin v. Kauffman, 418 F.2d 163 (7th Cir. 1969); Environmental Defense Fund v. Ruckelshaus, 439 F.2d 584, 598 (1971).

46. Seattle Trust v. Roberge, 278 U.S. 116, 122-123 (1928); Eubank v. Richmond, 226 U.S. 137, 143-144 (1912).

in U. S. v. Mazurie[47] that limitations on delegation of legislative power are "less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter".

Moreover, the Court stated: "nor must such a subdelegation rest on express statutory authority".[48]

The Court's approval of this subdelegation was in error because:

a. In Mazurie this Court upheld an express Congressional delegation of legislative power to Indian tribes, to regulate the introduction of liquor into Indian county. Here, the delega-

47. 419 U.S. 544, 556-557 (1975).

48. 700 F.2d at 556.

tion of power to the Indians was made by the Secretary alone.

b. In Mazurie there were safeguards against Indian arbitrariness in that the Indians could exercise their delegated authority only pursuant to ordinance approved by the Secretary. Here, there is no provision for prior or subsequent Secretarial review of the Indians' exercise of power. This Court has expressly reserved decision on the question of whether and to what extent the Fifth Amendment would be available to correct arbitrary or discriminatory tribal exercise of its delegated federal authority.[49]

c. Mazurie involved control of liquor in Indian country - a matter

49. 419 U.S. at 558, f.n. 12.

of local control over tribal life.[50] Here we have an interstate railroad. Authority over interstate commerce is reserved to Congress.

Implicit divestiture of Indian sovereignty has been held to have occurred in areas such as this, involving relations between an Indian tribe and nonmembers of the tribe.[51] Because an attempt by the tribe to exclude an interstate railroad is inconsistent with the overriding interests of the national government, its power to do so is implicitly divested.[52]

50. 419 U.S. at 557.

51. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978); United States v. Wheeler, 435 U.S. 313 (1978).

52. Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980).

d. The Court of Appeals justified the subdelegation because "a tribe has independent authority to regulate the use of its own lands".[53]

Powers lawfully vested in an Indian tribe are not, in general, powers delegated by express acts of Congress.[54] A tribe's inherent powers of limited sovereignty are subject to defeasance by the supreme legislative power of the United States.[55] Thus,

53. 700 F.2d at 556.

54. F. Cohen, Handbook of Federal Indian Law, 122 (Univ. New Mexico ed. undated).

55. Cherokee Nation v. Kansas Railway Co., 135 U.S. 641 (1889). See also Santa Clara Pueblo v. Martinez, 436 U.S. 47, 56 (1978):

> ". . . Congress has plenary authority to limit, modify, or eliminate the powers of local self-government which the tribes otherwise possess. . . Title I of the ICRA, 25 U.S.C. §§1301-1303, represents an exercise of that authority."

statutes of Congress must be examined to discover limitations on, not sources of, tribal power.[56]

By the 1899 Act, Congress expressly exercised its plenary power over tribal lands and granted railroad rights-of-way across Indian lands. The retained sovereign power to exclude railroads from Indian land was thereby divested.

C. CONCLUSION

The Ninth Circuit in this case has reached a result contrary to the clear mandate of Congress. It has approved a procedure violative of constitutional principles of delegation of powers and due process prohi-

56. F. Cohen, Handbook of Federal Indian Law, 122 (Univ. New Mexico ed. undated); 70 Mich. L. Rev. 955, 955-956.

bitions against arbitrary exercise of discretion.

If not corrected by this Court, public utilities attempting to utilize rights-of-way across Indian land, created by specific Congressional Acts, must choose between complying with uncontrolled Indian demands, terminating service, or increasing the utility cost to consumers.

(Signature Page Follows)

Respectfully submitted,

FOLEY, MC INTOSH & FOLEY
Professional Corporation

By /s/ Robert J. Foley
Robert J. Foley

By /s/ William R. Foley
William R. Foley

ECHEVERRIA AND OSBORNE,
CHARTERED

By /s/ Peter Echeverria
Peter Echeverria

By /s/ Nathan M. Jenkins
Nathan M. Jenkins

Attorneys for Petitioner,
SOUTHERN PACIFIC TRANS-
PORTATION COMPANY

APPENDICES
[Rule 21.1(k)]
[Index to Appendices)

Page

APPENDIX A:

1. Decision of the United States Court of Appeals, Ninth Circuit, decided 1 March 1983, published at 700 F.2d 550 (1983). i

APPENDIX B:

1. Decision of the United States Court of Appeals, Ninth Circuit, decided 10 September 1976, published at 543 F.2d 676 (1976) (companion case). ii

2. Decision of the Assistant Secretary of the Interior for Indian Affairs, dated 19 June 1978. iii

Page

3. Summary Judgment, entered 14 August 1980, by the United States District Court, District of Nevada, to which is appended Order Granting Summary Judgment, entered 25 July 1980. iv

4. Amended Summary Judgment, entered 28 August 1980, by the United States District Court, District of Nevada. v

APPENDIX C:

1. Note: A copy of the judgment sought to be reviewed is included at APPENDIX A.1. vi

2. Petition for Rehearing and Suggestion for Rehearing in

Banc, filed by Southern Pacific Transportation Company on 14 March 1983 in the United States Court of Appeals for the Ninth Circuit. vii

3. Order denying rehearing and rejecting suggestion for rehearing in banc, dated 9 June 1983 by the United States Court of Appeals for the Ninth Circuit. viii

4. Motion for Stay of Mandate Pending Application for Writ of Certiorari, filed by Southern Pacific Transportation Company on 14 June 1983 in the United States Court of Appeals for the Ninth Circuit. ix

Page

5. Order on Motion for Stay of Mandate, dated 27 June 1983, by the United States Court of Appeals for the Ninth Circuit. x

APPENDIX D:

1. United States Constitution, Art. I, §8. xi

2. United States Constitution, Fifth Amendment. xii

3. 5 U.S.C. §706. xiii

4. Act of 2 March 1899, ch. 374, 30 Stat. 990 (25 U.S.C. §§312-318) ("1899 Act"). xiv

5. Act of 5 February 1948, ch. 45, 62 Stat. 17 (25 U.S.C. §§323-328) ("1948 Act"). xv

Page

6. Act of 18 June 1934, ch. 576, 48 Stat. 987 Section 16, (Indian Reorganization Act; "IRA") (25 U.S.C. §476). xvi

APPENDIX E:

1. 25 C.F.R. §§256.1-256.31 (1951). xvii

2. 25 C.F.R. §161.3 (1981). xviii

3. 25 C.F.R. §§169.1-169.28 (1982). xix

APPENDICES

APPENDIX A

1. Decision of the United States Court of Appeals, Ninth Circuit, decided 1 March 1983, published at 700 F.2d 550 (1983).

"In this instance we conclude that the universal desire of parents to secure the advantages of higher education for their children and to offset whenever possible the increasing cost of such education, makes the application of the registration requirements of the Securities Act emphatically necessary here. While there is no showing of fraud or misrepresentation of any kind and it may well be that the founders of The Foundation are themselves actuated by a sincere desire to aid their fellowman and to foster the education of the youth of this nation, the opportunities for wrongdoing with such a broad and fertile field of prospective investors are unlimited."

American Foundation at 881.

In support of the *American Foundation* and *Waddle* decisions, this court is mindful of the Supreme Court's admonition in *SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 351, 64 S.Ct. 120, 123, 88 L.Ed. 88 (1943), that "the reach of the Act does not stop with the obvious and commonplace," and the oft-quoted directive in *SEC v. W.J. Howey, Co.*, 328 U.S. 293, 299, 66 S.Ct. 1100, 1103, 90 L.Ed. 1244 (1946), that the concept of security "embodies a flexible rather than a static principle, one that is capable of adaption to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits." We are also aware that the design of the securities laws and their purpose for requiring registration of all securities in the absence of statutory exemption is to protect investors by promoting and requiring a full disclosure of information thought to be necessary to persons desiring to make informed investment decisions. *SEC v. Ralston Purina Co.*, 346 U.S. 119, 73 S.Ct. 981, 97 L.Ed. 1494 (1953).

For these reasons we conclude that the CAP pre-need college tuition plans are investment contracts within the definitional bounds of the Guam Uniform Securities Act and are, therefore, subject to the registration requirements of such Act.

AFFIRMED.

SOUTHERN PACIFIC TRANSPORTATION COMPANY, Plaintiff-Appellee,

v.

James G. WATT, Secretary of the Interior, et al., Defendant-Appellant,

and

Walker River Paiute Tribe of Nevada, Defendant-Intervenor-Appellant.

Nos. 80-4505, 80-4506.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Jan. 14, 1982.

Decided March 1, 1983.

Railroad sought review of administrative denial of its application for railroad, telephone and telegraph right-of-way across tribal lands for lack of tribal consent to right-of-way. The United States District Court for the District of Nevada, Bruce R. Thompson, J., granted summary judgment for railroad, and tribe and Secretary of the Interior appealed. The Court of Appeals, Canby, Circuit Judge, held that Secretary acted within his power in requiring by regulation that tribal consent be obtained for acquisition of right-of-way.

Reversed and remanded.

1. Indians ⇐10

Statute which grants right-of-way for railway, telegraph and telephone line through any Indian reservation to any railroad which complies with applicable statutory provisions and rules and regulations was intended fully to protect Indian interests and must be liberally construed in favor of Indians. 25 U.S.C.A. §§ 312-318

2. Indians ⇐15(2)

Under statute which grants right-of-way for any railway, telegraph and tele

phone line through any Indian reservation to any railroad which complies with statutory provisions and rules and regulations, Secretary of the Interior acted within his power in requiring by regulation that tribal consent be obtained for acquisition of right-of-way by railroad. 25 U.S.C.A. §§ 312-318.

3. Indians ⇐10

Statute which grants right-of-way for railway, telegraph and telephone line through any Indian reservation to any railroad that complies with statutory provisions and rules and regulations does not constitute grant to railroad companies of power of eminent domain since statute contains no express grant of power of eminent domain nor is it necessary to imply such a grant to make statute effective. 25 U.S.C.A. §§ 312-318.

4. Public Lands ⇐71

Once grant in praesenti, which was judicially created to establish priorities among rival private claimants to federal lands, is approved by designated government official, it relates back to date grantee commenced proceedings to obtain title and cuts off all claimants whose rights were initiated later but relation back of title applies only as against other intervening claimants and, as against United States, no vested right arises until requirements are met and grant has been approved by designated official.

5. Constitutional Law ⇐62(5)
Indians ⇐15(1)

Congress may vest in administrative official the authority to establish discretionary conditions with which prospective grantees must comply in order to make grants effective and trigger relation back of title, and Congress did exactly that in statute which grants right-of-way for railway, telegraph and telephone line through any Indian reservation to any railroad which complies with statutory provisions and rules and regulations promulgated thereunder. U.S.C.A. §§ 312-318.

6. Constitutional Law ⇐62(1)

Subdelegation of administrative authority to an Indian tribe is analogous to subdelegation to state or local government, which is not per se improper, and such a subdelegation need not rest on express statutory authority.

7. Indians ⇐15(2)

Secretary of the Interior's regulation requiring that tribal consent be obtained for acquisition of right-of-way was not abdication of Secretary's power to administer statute which grants right-of-way for railway, telegraph and telephone line through any Indian reservation to any railroad that complies with statutory provisions and rules and regulations prescribed thereunder but, rather, constituted effort by Secretary to incorporate into decision-making process the wishes of a body with independent authority over affected lands, and thus redelegation was proper. 25 U.S.C.A. §§ 312-318.

Laura Frossard, Atty., Dept. of Justice, Washington, D.C., Yvonne T. Knight, Native Americans Rights Fund, Boulder, Colo., for Watt.

Nathan Jenkins, Reno, Nev., William R. Foley, Robert J. Foley, Foley, McIntosh & Foley, Albany, Cal., for Southern Pacific.

James McCartney, Houston, Tex., for amicus curiae Transwestern Pipeline Co.

Appeal from the United States District Court for the District of Nevada.

Before FLETCHER, POOLE and CANBY, Circuit Judges.

CANBY, Circuit Judge:

The Walker River Paiute Tribe of Nevada (Tribe) and the Secretary of the Interior (Secretary) appeal from the district court's grant of summary judgment in favor of Southern Pacific Transportation Company (Southern Pacific). The district court held that tribal consent is not a condition precedent to the filing and processing of an application for a right-of-way across tribal lands under the Act of March 2, 1899, ch. 374, 30 Stat. 990 (codified at, 25 U.S.C.

§§ 312–318 (1976)) (1899 Act or Act). We disagree and reverse the grant of summary judgment in favor of Southern Pacific.

I. Facts

The relevant facts are undisputed. Since 1882 Southern Pacific and its predecessors have operated a railway and adjoining telephone and telegraph lines over lands within the Walker River Indian Reservation. In 1976, this court held that Southern Pacific "does not have and has never had a valid right-of-way across lands within the original 1874 executive order boundaries of the Walker River Reservation except through the lands ceded by the Tribe to the United States in 1906." *United States v. Southern Pacific Transpor.*, 543 F.2d 676, 699 (9th Cir.1976) (*Southern Pacific I*). As a result, on April 28, 1977, Southern Pacific filed an application with the Western Nevada Agency of the Bureau of Indian Affairs for a railroad, telephone and telegraph right-of-way through 10.89 miles of tribal lands within the Walker River Indian Reservation. Southern Pacific sought the right-of-way under the provisions of the 1899 Act. On May 4, 1977, the Agency Superintendent rejected the application without filing it, because it did not include evidence that the Tribe had consented to the right-of-way. Southern Pacific appealed the Agency Superintendent's decision within the agency, and the decision was upheld at all administrative levels.

Southern Pacific sought review of the agency action in federal district court. The Tribe intervened as a party-defendant. After cross motions for summary judgment, the district court entered judgment in favor of Southern Pacific. This appeal followed.

II. Discussion

We must determine whether Congress has authorized the Secretary to impose a condition of tribal consent on an application for a right-of-way under the 1899 Act. The Secretary and the Tribe contend that the 1899 Act itself vests in the Secretary the authority to impose conditions, including tribal consent, on railroad rights-of-way across Indian tribal lands. They argue that the district court erred in characterizing the 1899 Act as an eminent domain statute and a grant *in praesenti*. The Tribe argues in the alternative that even if the 1899 Act is a grant *in praesenti*, that fact would not preclude the Secretary from establishing conditions with which prospective grantees must comply before a grant becomes effective. We conclude that the 1899 Act is not an eminent domain statute. We further conclude that the 1899 Act—whether a grant *in praesenti* or not—authorizes the Secretary to establish, by regulation, grant preconditions, including one of tribal consent. The Secretary has exercised that authority and promulgated a regulation providing that "[n]o right-of-way shall be granted over and across any tribal land without the prior consent of the tribe." 25 C.F.R. § 161.3(a) (1981). We reject Southern Pacific's contention that the regulation constitutes an unlawful redelegation of the Secretary's authority.

[1] In interpreting the 1899 Act, we are guided by our earlier determination in this case that the Act was intended fully to protect Indian interests. *Southern Pacific I*, 543 F.2d at 692; *see* H.R.Rep. No. 1896, 55th Cong., 3d Sess. 2 (1899). It must therefore be liberally construed in favor of the Indians. *Id.*; *see Bryan v. Itasca County*, 426 U.S. 373, 392, 96 S.Ct. 2102, 2112, 48 L.Ed.2d 710 (1976). We must also bear in mind that the construction of a statute rendered by the agency charged with its administration is ordinarily entitled to substantial deference. *United States v. Rutherford*, 442 U.S. 544, 553, 99 S.Ct. 2470, 2475, 61 L.Ed.2d 68 (1979); *Udall v. Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616 (1965); *Central Lincoln Peoples' Utility Dist. v. Johnson*, 673 F.2d 1076, 1078 (9th Cir.1982); *Adams v. Howerton*, 673 F.2d 1036, 1040 (9th Cir.), cert. denied, — U.S. —, 102 S.Ct. 3494, 73 L.Ed.2d 1378 (1982). Our review is limited to determining whether the Secretary's interpretation is reasonable. *Central Lincoln*, 673 F.2d at 1078; *Columbia Basin Land Protection Assoc'n v. Schlesinger*, 643 F.2d 585, 600 (9th Cir.1981).

A. The 1899 Act

[2] The 1899 Act provides in part:

> A right of way for a railway, telegraph and telephone line through any Indian reservation . . . is granted to any railroad company organized under the laws of the United States, or of any State or Territory, which shall comply with the provisions of sections 312-318 of [the 1899 Act] and such rules and regulations as may be prescribed thereunder.

25 U.S.C. § 312 (1976). Provisos follow that establish certain conditions that the Secretary must assure have been fulfilled. The district court held that the 1899 Act grants to a railroad the power of eminent domain to condemn rights-of-way through Indian reservations and that "[t]he concept of tribal consent as a pre-condition to the grant of a right-of-way is the very antithesis of the exercise of the power of eminent domain." The district court also held the 1899 Act to be a grant *in praesenti* subject to the performance of conditions precedent and conditions subsequent. Therefore, in the district court's view, the Act does not vest in the Secretary authority to establish grant preconditions beyond those contained in the statute but rather expressly specifies the conditions the Secretary must find to be satisfied prior to approving an application. The Secretary and the Tribe challenge the district court's determination that the 1899 Act is a grant of the power of eminent domain and a grant *in praesenti*. They argue that Section 312 of the Act delegates to the Secretary authority to promulgate legislative rules and, thereby, the authority to establish grant preconditions by regulation. We conclude that the interpretation advanced by the Secretary and the Tribe is both reasonable and in accord with our obligation to construe the 1899 Act liberally in the Tribe's favor. Having concluded that the interpretation advanced by the Secretary of Interior, the head of the agency charged with administration of the 1899 Act, is reasonable, we need not inquire further into the meaning of the provisions of the Act. "[W]e need not find that [the Secretary's] construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings." *Udall v. Tallman*, *supra*, 380 U.S. at 16, 85 S.Ct. at 801, *quoting Unemployment Compensation Comm'n of Alaska v. Aragon*, 329 U.S. 143, 67 S.Ct. 245, 91 L.Ed. 136 (1946). It is enough that the Secretary's interpretation is reasonable, and there are several grounds for concluding that it is.

The plain language of the Act supports the interpretation of the Secretary and the Tribe. Section 1 provides that a right-of-way "is granted" to a railroad company that complies "with the provisions of sections 312-318 of this title [the 1899 Act] *and* such rules and regulations as may be prescribed thereunder . . . ." 25 U.S.C. § 312 (1976) (emphasis added). Thus, section 1 may be read to establish two sources of conditions precedent: the statutory provisions and the Secretary's regulations. That reading of section 1 is reinforced by the fact that section 7 directs the Secretary to "make all needful rules and regulations, not inconsistent with sections 312-318 of this title, for the proper execution and carrying into effect of all the provisions of said sections." *Id.* at § 317. The grant of rule-making authority in section 1 would be superfluous if it did not confer authority to promulgate requirements, beyond those specified in the Act. Furthermore, the use of the phrase "rules and regulations, *not inconsistent* with sections 312-318 of this title" (emphasis added) in section 7 (§ 317) rather than such a phrase as "rules and regulations, in furtherance of the provision of sections 312-318 of this title" supports a broad interpretation of the grant of rule-making authority.

Nothing in the legislative history of the 1899 Act suggests that the interpretation urged by the Secretary and the Tribe is unreasonable. That history is silent on the question of the scope of the authority vested in the Secretary by the Act. See H.R. Rep. 1896, 55th Cong., 3d Sess. 1-2 (1899); 32 Cong.Rec. 1753-55, 1849, 2041-42, 2471-72 (1899).

The construction we approve here is also consistent with the 1948 General Rights-of-Way Act, Pub.L. No. 80-407, 62 Stat. 17 (codified in 25 U.S.C. §§ 323-328 (1976)) (1948 Act), which provides that "[n]o grant of a right-of-way over and across any lands belonging to a tribe organized under [the Indian Reorganization Act of 1934][1] . . . shall be made without the consent of the proper tribal officials." 25 U.S.C. § 324 (1976). We recognize that interpretation of the 1899 Act must rest primarily on its own language and legislative history. Nevertheless, the 1899 Act and the 1948 Act both pertain to rights-of-way across Indian lands and share a common purpose: the preservation and protection of Indian interests. The Supreme Court has expressly approved the construction of statutes affecting reservation Indians in light of intervening legislation. *Bryan v. Itasca County*, *supra*, 426 U.S. at 386, 96 S.Ct. at 2109; *see Moe v. Salish & Kootenai Tribes*, 425 U.S. 463, 472-75, 96 S.Ct. 1634, 1640-42, 48 L.Ed.2d 96 (1976). Furthermore, the legislative history of the 1948 Act suggests that the drafters of that Act believed that, at least after adoption of the 1948 Act, no right-of-way across lands of a tribe organized under the 1934 Act could be granted without tribal consent. *See* S.Rep. No. 828, 80th Cong., 2d Sess., *reprinted in* [1948] U.S.Code Cong. & Ad.News 1033, 1036. *See also Escondido Mutual Water Co. v. Federal Energy Regulatory Comm'n*, 692 F.2d 1223, 1232 (9th Cir.1982).

B. Grant of Eminent Domain Power

[3] In reaching the conclusion that the 1899 Act vests in the Secretary authority to require tribal consent prior to processing of a right-of-way application, we necessarily reject characterization of the 1899 Act as a grant to railroad companies of the power of eminent domain. "Eminent domain is the power of the sovereign to take property for public use without the owner's consent." 1 J. Sackman, *Nichols' The Law of Eminent Domain* § 1.11, at 1-7 (3d ed. 1981). It is well settled that the power of eminent domain may be delegated by Congress to a private corporation. *Custiss v. Georgetown & Alexandria Turnpike Co.*, 10 U.S. (6 Cranch) 232, 3 L.Ed. 209 (1810) (Marshall, C.J.); 1 Nichols, *supra*, at § 3.23, at 3-212. A grant of the power, however, must be conferred "in express terms or by necessary implication." *Western Union Tel. Co. v. Penn R.R. Co.*, 195 U.S. 540, 564-69, 25 S.Ct. 133, 49 L.Ed. 312 (1904); 1 Nichols, *supra*, at § 3.21[4], at 3-60; *accord*, 3 C. *Sands*, Sutherland Statutory Construction § 64.06, at 128 (4th ed. 1974).

Comparison of the 1899 Act with contemporaneous acts held to be eminent domain statutes reveals that the 1899 Act does not contain the language characteristic of a grant of the power of eminent domain. The Act of February 18, 1888, ch. 13, 25 Stat. 35 (held to be a grant of the power of eminent domain in *Noble v. Oklahoma City*, 297 U.S. 481, 490, 56 S.Ct. 562, 566, 80 L.Ed. 816 (1936)), and the Act of March 3, 1899, ch. 453, 30 Stat. 1368 (held to be a grant of the power of eminent domain in *United States v. Ft. Smith & W.R. Co.*, 195 F. 211, 212 (8th Cir.1912), both provide that a named railroad is "invested and empowered with the right of locating, constructing, owning, equipping, operating, using, and maintaining a railway" and "is authorized to take and use" a right-of-way for railway purposes and "to take and use" land for station purposes. Nowhere in the 1899 Act is there language conferring on a railroad the right to condemn or the right to take and use. The operative language of the 1899 Act is the phrase "is granted," which imports not a delegation of the power of eminent domain but rather a direct conveyance, conditional or not, by Congress or an administrative agency. Thus, the 1899 Act contains no express grant of the power of eminent domain, nor is it necessary to imply such a grant to make the Act effective.

We therefore conclude that the district court erred in holding that the 1899 Act

1. The Walker River Paiute Tribe of Nevada is the governing body of the Walker River Indian Reservation. The Tribe is organized pursuant to section 16 of the Indian Reorganization Act, Pub.L. No. 73-383, 48 Stat. 984, 987 (1934) (codified in 25 U.S.C. § 476 (1976)).

was a grant of the power of eminent domain.[2]

C. Grant *In Praesenti*

[4] The district court also held that the 1899 Act was a grant *in praesenti*. We find it unnecessary to resolve that question.[3] The doctrine of *in praesenti* grants was judicially created to establish priorities among rival private claimants to federal lands. A grant *in praesenti* "imports the transfer . . . of a present interest in the lands designated" by the act. *Van Wyck v. Knevals*, 106 U.S. 360, 365, 1 S.Ct. 386, 387, 27 L.Ed. 201 (1882). The words "is hereby granted" are characteristic of an *in praesenti* grant. *Noble v. Oklahoma City*, *supra*, 297 U.S. at 490-91, 56 S.Ct. at 566. Once the grant is approved by the designated government official, it "relates back to the initiatory right [the date the grantee commenced proceedings to obtain title], and cuts off all claimants whose rights were initiated later." *Stalker v. Oregon Shortline R.R.*, 225 U.S. 142, 149, 32 S.Ct. 686, 688, 56 L.Ed. 1027 (1912); *accord*, *Van Wyck v. Knevals*, 106 U.S. at 365, 1 S.Ct. at 387. The relation back of title applies only as against other intervening claimants. As against the grantor United States, no vested right arises until the requirements are met and the grant has been approved by the designated official. *Stalker v. Oregon Shortline R.R.*, 225 U.S. at 149, 32 S.Ct. at 688; *Shepley v. Cowan*, 91 U.S. 330, 338, 23 L.Ed. 424 (1876).

[5] Nothing in this scheme of *in praesenti* grants, nor in its purpose of protecting grantees against intervening private claims, necessarily limits the right of the grantor United States to condition the grant. It is true that in the typical *in praesenti* grant, the determination of the Secretary that the grantee has complied with the conditions of the grant is a ministerial function. Neither authority nor logic requires that this be the case, however. We have been shown no sufficient reason to conclude that Congress is unable to vest in an administrative official the authority to establish discretionary conditions with which prospective grantees must comply in order to make the grants effective and trigger the relation back of title. Our examination of section 312 convinces us that Congress has done exactly that. Congress' action is effective whether or not the Act provides for grants *in praesenti*. That is all we need to decide about the meaning of the Act.

2. In so holding, we reject two statements of other courts of appeal characterizing the 1899 Act as a grant of eminent domain. *See United States v. Ft. Smith & W.R. Co.*, 196 F. 211, 214 (8th Cir.1912); *Clarke v. Boysen*, 39 F.2d 800, 814 (10th Cir.), *cert. denied*, 282 U.S. 889, 51 S.Ct. 75, 75 L.Ed. 768 (1930). Those statements, relied on by the district court here, were neither well considered nor necessary to the decisions in which they appeared. *Ft. Smith* arose under a different statute (also passed in 1899), and *Clarke*, in its relevant portions, concerned the question whether the 1899 Act applied to reservation lands previously ceded to the United States.

The district court in the present case also relied on provisions for determining compensation for rights-of-way in the absence of consent, in section 3 of the 1899 Act, 25 U.S.C. § 314 (1976), as well as a footnote in Cohen's Handbook of Indian Law referring to the right of railway companies to condemn Indian land. F. Cohen, *Handbook of Federal Indian Law* 98 n. 76 (1942). Both of these references are to acquisition of rights-of-way over individually allotted lands, not tribal lands such as those involved in the present dispute. The two are not inevitably treated the same. *See Yellowfish v. Stillwater*, 691 F.2d 926 (10th Cir.1982).

3. We disagree with the district court's reading of our prior decision, *Southern Pacific I*, *supra*, as "impliedly recognizing that the [1899] Act is a grant *in praesenti* of a right-of-way . . . ." In *Southern Pacific I* we did not reach the question whether the 1899 Act is a grant *in praesenti*. We did point out that the granting clause of the 1899 Act differed significantly from that of the 1875 Act, a statute previously held to be a grant *in praesenti*. 543 F.2d at 691. We further noted that to qualify as a grantee under the 1899 Act, a railroad must comply with requirements not found in the 1875 Act. *Id.* We then held that Southern Pacific's predecessors did not comply with the compensation requirement of the 1899 Act and, therefore, failed to acquire a right-of-way under that Act. *Id.* at 692-93. To reach that result in *Southern Pacific I*, it was unnecessary for us to decide whether the additional requirements contained in the 1899 Act were consistent with the characteristics of a grant *in praesenti*.

D. Redelegation of the Secretary's Authority

Southern Pacific contends that if the 1899 Act is construed to authorize the Secretary to establish conditions precedent to the grant of a right-of-way under that Act, the Secretary, by requiring tribal consent under 25 C.F.R. § 161.3(a) (1981), has improperly redelegated that decisional authority to the Indian tribes. We conclude that the challenged redelegation is permissible.

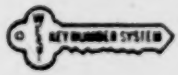
[6] Subdelegation of administrative authority to an Indian tribe is analogous to subdelegation to a state or local government. "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory . . . ; they are 'a separate people' possessing 'the power of regulating their internal and social relations . . . .'" *United States v. Mazurie*, 419 U.S. 544, 557, 95 S.Ct. 710, 717, 42 L.Ed.2d 706, 716–17 (1975) (citations omitted). Subdelegation of administrative authority to a sovereign entity is not *per se* improper. *Id.*; *see United States v. Matherson*, 367 F.Supp. 779, 781–83 (E.D.N.Y. 1973) (upholding regulation issued by Superintendent of Fire Island National Seashore requiring persons seeking to operate motor vehicles on certain national seashore lands to secure first a permit from the local municipality), *aff'd mem.*, 498 F.2d 1399 (2d Cir.1974). Nor must such a subdelegation rest on express statutory authority. *See Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 120–22, 67 S.Ct. 1129, 1134, 91 L.Ed. 1375 (1947); *Tabor v. Joint Bd. for Enrollment of Actuaries*, 566 F.2d 705, 708 n. 5 (D.C.Cir.1977).

[7] The regulation at issue is not an abdication of the Secretary's power to administer the 1899 Act but rather an effort by the Secretary to incorporate into the decision-making process the wishes of a body with independent authority over the affected lands. The regulation does not relinquish to a tribe the final authority to approve; it delegates a power to disapprove. *Cf. United States v. Matherson*, 367 F.Supp. at 788 (Superintendent retains ultimate authority to approve permit). Moreover, while the local jurisdictions in *Matherson* had no source of power separate from the regulation to control the use of national seashore lands, a tribe has independent authority to regulate the use of its own lands. The Supreme Court has stated that the limitations on Congressional delegation of legislative power are "less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter." *United States v. Mazurie*, 419 U.S. at 556–57, 95 S.Ct. at 717 (citation omitted). Applying that principle to the redelegation of legislative authority by an administrative body, we conclude that the redelegation embodies in 25 C.F.R. § 161.3 is not improper.

III. Conclusion

The Secretary acted within his power in requiring by regulation that tribal consent be obtained for the acquisition of rights-of-way pursuant to the 1899 Act, 25 U.S.C. § 312 (1976). The summary judgment in favor of Southern Pacific is reversed and the case is remanded to the district court for further proceedings consistent with this opinion.

REVERSED AND REMANDED.



Billy Irl GLOVER, Plaintiff-Appellant,

v.

Bruce TOWER, Public Defender of Douglas County, Oregon and Gary Babcock, Public Defender of the State of Oregon, Defendants-Appellees.

No. 81-3199.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Dec. 7, 1982.

Decided March 1, 1983.

Plaintiff filed pro se action alleging that public defenders who represented him

APPENDIX B

1. Decision of the United States Court of Appeals, Ninth Circuit, decided 10 September 1976, published at 543 F.2d 676 (1976) (companion case).

For courts to require strict adherence to legal principles in the award of pecuniary damages is a useless exercise if there are no legal principles to guide the district courts in the award of non-pecuniary damages. Indeed, to avoid having its [sic] awards overturned, district courts will be encouraged to minimize pecuniary damages and maximize non-pecuniary damages.

By cutting back on some of the non-pecuniary awards here we wish it to be understood that there must be some limit on these incalculable damages. At the same time, we are unwilling to go as far as the Government suggests. Under the Act, non-pecuniary damages, like pecuniary damages, should be substantially compensatory. The exercise of some supervisory control on one and not on the other would destroy the essential compensatory purpose of the statute. On the facts of this case where substantial grief and loss of affection and companionship have been demonstrated, we do not believe that nominal non-pecuniary damages would be compensatory.

After a careful review of each award, and in the light of what we have said above, we conclude that the amounts the plaintiffs shall recover are the following:

Mrs. Pelder: pecuniary, $468,888; non-pecuniary, $50,000; total, $488,888. Harry Pelder, III: pecuniary, $20,000; non-pecuniary, $15,000; total $35,000. Celeste Diane Pelder: pecuniary, $20,000; non-pecuniary, $25,000; total, $45,000. Richard Pelder: pecuniary, $35,000; non-pecuniary, $30,000; total $65,000. Lauren Pelder: pecuniary, $40,000; non-pecuniary, $35,000; total $75,000.

Mrs. Heseches: pecuniary $320,000; non-pecuniary, $50,000; total, $370,000. Robert Heseches: pecuniary, $20,000; non-pecuniary, $25,000; total $45,000. Thomas Heseches: pecuniary, $35,000; non-pecuniary, $30,000; total, $65,000.

Mrs. Burns: pecuniary, $450,000; non-pecuniary, $50,000; total, $500,000. Timothy Burns: pecuniary, $40,000; non-pecuniary, $50,000; total, $90,000.

The judgment of the district court is affirmed on the issue of liability and modified on the issue of damages. The cause is remanded with directions to enter a modified judgment in the amounts herein set forth. No costs will be allowed.

UNITED STATES of America, Plaintiff,

The Walker River Paiute Tribe of Nevada and Robert Henton et al., Plaintiffs-Appellants,

v.

SOUTHERN PACIFIC TRANSPORTATION COMPANY et al., Defendants-Appellees.

UNITED STATES of America, Plaintiff-Appellant,

v.

SOUTHERN PACIFIC TRANSPORTATION COMPANY et al., Defendants-Appellees.

Nos. 74-3333, 75-1606.

United States Court of Appeals, Ninth Circuit.

Sept. 10, 1976.

Action was brought by Indian tribe and class of individual allottees of land traversed by railroad for declaratory judgment, injunctive relief and damages. United States instituted second suit on its own behalf and on behalf of tribe and allottees. The actions were consolidated. The United States District Court for the District of Nevada, at Reno, Bruce R. Thompson, J., entered judgment from which the United States, the Indian tribe and the allottees appealed. The Court of Appeals, Wallace, Circuit Judge, held, inter alia, that court did not have jurisdiction over the claims of

individual allottees since their claims could not be aggregated for purpose of determining a jurisdictional amount, that the 1875 Act applied to executive order Indian reservations, that railroad did not acquire a right-of-way under the 1869 Act, that railroad did acquire a right of-way through nonirrigable lands ceded by tribe in 1906, and that there could not be an implied in-fact or implied in-law license to railroad to operate line through reservation.

Affirmed in part, reversed and remanded in part.

1. Courts ⇐ 405(14.8)

Where action was brought by Indian tribe and allottees against railroad charging trespass and district court in effect decided only issue of liability on trespass claims without deciding what would be appropriate, judgment was not final as to one entire claim and therefore not appealable until the district judge certified the appeal under statute. 28 U.S.C.A. §§ 1291, 1292(b).

2. Courts ⇐ 336

Defendant's challenge of allegation regarding the requisite jurisdictional amount in controversy, made in its opposition to plaintiff's motion for summary judgment, was timely, and shifted burden to plaintiff allottees of Indian lands to show that it did not appear to a legal certainty that their claims were for less than the required amount. 28 U.S.C.A. § 1331; Fed.Rules Civ. Proc. rule 12(h)(3), 28 U.S.C.A.

3. Courts ⇐ 405(2)

Court of Appeals is bound to consider jurisdictional defects sua sponte.

4. Courts ⇐ 328.6(4)

In action by Indian tribe and certain individual allottees against railroad for trespass, it was error to aggregate allottees' claims to determine whether the requisite $10,000 jurisdictional requirement was met. 28 U.S.C.A. § 1331.

5. Courts ⇐ 328.4(2)

Class members may aggregate their claims to satisfy amount in controversy requirement only when their claims are joint and common and not separate and distinct. 28 U.S.C.A. § 1331.

6. Courts ⇐ 328.4(2)

Test for aggregating claims of one plaintiff against multiple defendants for purpose of satisfying amount in controversy requirement is essentially the same as that for aggregating claims of multiple plaintiffs against one defendant; plaintiff's claims against defendant must be common and undivided so that defendants' liability is joint and not several. 28 U.S.C.A. § 1331.

7. Indians ⇐ 13(1)

Allotment of tribal lands are made to individual Indians in severalty and in trust for sole use and benefit of Indian to whom allotment shall have been made.

8. Courts ⇐ 328.4(4)

Claims of Indian allottees against railroad with respect to trespass arose only with respect to status of each as individual allottee of portion of reservation, and their claims could not be aggregated for purpose of satisfying necessary jurisdictional amount. 28 U.S.C.A. § 1331.

9. United States ⇐ 124

United States bringing action against railroad with respect to alleged trespass on Indian reservation and land of allottees had capacity to sue for protection of allotted land.

10. Indians ⇐ 16(1)

Agreements between railroad's predecessor and Indian tribe with relation to railroad right-of-way through reservation did purport to convey claim to Indian lands from an Indian tribe and were invalid under the then applicable statute prohibiting any conveyance of land from any Indian nation or tribe unless made by treaty or convention entered into pursuant to Constitution. 25 U.S.C.A. § 177.

11. Indians ⇐ 3

Abrogation of Indian treaty rights under congressionally retained plenary powers to control the use of tribal lands, to grant adverse interest and to extinguish Indian

title completely is not lightly inferred from congressional acts.

12. Indians ⇐3

Abrogation of treaty rights is subject to constitutional limitations that such property rights cannot be taken without payment of just compensation.

13. Indians ⇐12

With respect to executive order reservations Indians have exclusive right to possession but title to lands remains with United States; with respect to Congress' plenary power to control use, grant adverse interests or extinguish Indian title executive order reservations do not differ from treaty or statutory reservations except that so long as Congress has not recognized compensable interests in Indians executive order reservations may be terminated by Congress or the executive without payment of compensation. 25 U.S.C.A. §§ 71, 398; 43 U.S.C.A. § 150; Const. art. 2, § 2, cl. 2.

14. Indians ⇐6

Statutes enacted for protection of Indians must be broadly construed in the Indians' favor.

15. Indians ⇐12

Congress by enacting 1875 statute relating to railroad rights-of-way through public lands of United States but not applying to any lands within the limits of any Indian reservation intended to exclude executive order reservations from application of Act. General Railroad Right of Way Act, § 5, 43 U.S.C.A. § 938.

16. Indians ⇐12

Since 1875 General Railroad Right of Way Act was inapplicable to executive order reservations, the attempted compliance with that Act by railroad and Interior Department with respect to filing of documents, including maps of right-of-way through executive order reservation was not effective to perfect a right-of-way through the reservation. General Railroad Right of Way Act, § 5, 43 U.S.C.A. § 938.

17. Public Lands ⇐7, 15(2)

While executive branch has broad authority to withdraw public lands from disposition under public land laws for benefit of Indians and to manage disposition of Indian lands, source of this authority is congressional acquiescence in its exercise, and since authority is delegated by Congress its exercise can be regulated by Congress.

18. Indians ⇐12

Approval by Secretary of the Interior of maps showing railroad right-of-way through Indian reservation created by executive order with no mention of any alteration of reservation boundaries did not operate to terminate reservation to extent of right-of-way sought; no right-of-way was acquired through reservation under the 1875 act by the erroneous approval of maps by Secretary of the Interior. General Railroad Right of Way Act, § 5, 43 U.S.C.A. § 938.

19. Indians ⇐12

Under 1899's general statute granting rights-of-way through Indian reservations to any railroad, which shall comply with provisions of act, grantee is not identified merely by filing articles and proofs of organization as under the 1875 act, but grantee must in addition comply with all provisions of 1899 act including requirements that maps be filed and approved and compensation be paid to Indian; construction of railroad is clearly not sufficient to acquire a right-of-way under the 1899 act. 25 U.S.C.A. § 312; General Railroad Right of Way Act, §§ 1, 4, 5, 43 U.S.C.A. §§ 934, 937, 938.

20. Indians ⇐12

The 1899 act granting railroads rights-of-ways through Indian reservations upon compliance with act does not allow for independent negotiations between railroads and Indians even if the compensation paid with respect to an agreement for right-of-way is later approved by Secretary of Interior in view of regulations thereunder requiring that compensation be determined in first instance by United States Indian agent or other designated official subject to Secre-

tary of the Interior's approval. 25 U.S.C.A. § 312.

21. Indians ⇐15(3)

Where railroad's predecessor constructed railroad through Indian reservation between 1880 and 1882 following negotiations directly with Indians and payment of compensation and the agreements were later "approved" by the Commissioner of Indian Affairs and the Secretary of the Interior before submitting the same to Congress for ratification, which never occurred, the right-of-way was not acquired under subsequently enacted 1899 act, since railroad's failed to comply with the requirements of act and the regulations thereunder. 25 U.S.C.A. § 314.

22. Indians ⇐12

Under 1899 act granting railroads right-of-ways through Indian reservations upon compliance with act, including payment of compensation to Indians, compensation should be determined as of date of grant of right-of-way. 25 U.S.C.A. § 314.

23. Indians ⇐13

The 1902 act providing for coding of nonirrigable lands within Indian reservation which were then open to public settlement "under existing laws," as implemented by the cession agreement and presidential proclamation, constituted special statutory exception to broad exclusion of Indian reservations from application of 1875 act granting railroad right-of-ways through public lands but excepting Indian reservations, and applied to the coded lands within reservation, and since railroad had already been constructed when cession became effective a right-of-way was obtained through the ceded lands under the 1875 act at time of cession. General Railroad Right of Way Act, §§ 1-6, 43 U.S.C.A. §§ 934-939; Act May 27, 1902, 32 Stat. 260.

24. Indians ⇐13

1906 cession of nonirrigable lands within Indian reservations pursuant to statute altered boundaries of reservation so that ceded lands were no longer within the limits of the reservation and thus available for railroad right-of-way grant under 1875 act granting railroads the right-of-ways through public lands but expressly excluding Indian reservations. General Railroad Right of Way Act, §§ 1, 5, 43 U.S.C.A. §§ 934, 938; Act May 27, 1902, 32 Stat. 261; Indian General Allotment Act, § 1 et seq., 25 U.S.C.A. § 331 et seq.

25. Indians ⇐16

Where United States holds land in trust for the Indians, the Indians should receive benefit of compensation for right-of-way granted just as they receive compensation for land taken by settlers.

26. Indians ⇐12

Where Indians had been paid in full for coded nonirrigable lands within boundaries of original reservation and the ceded lands were neither held in trust for Indians nor reserved for other purposes in connection with Indian service, the 1899 act relating to railroad right-of-ways through Indian reservations should not apply since the lands were "public lands" available for right-of-way grants under the earlier 1875 act. General Railroad Right of Way Act, §§ 1-6, 43 U.S.C.A. §§ 934-939.

27. Public Lands ⇐93

Railroad right-of-way may be obtained under the 1875 act granting railroad rights-of-way through public lands by construction of the railroad without any filing of maps. General Railroad Right of Way Act, § 5, 43 U.S.C.A. § 938.

28. Indians ⇐12

Where agreements between railroad and Indians respecting railroad right-of-way through Indian reservation were ineffective to grant right-of-way to railroad, a license could not be inferred as an implied in-fact contract because of failure of railroad to comply with statutes governing contracts with Indian tribes and an implied-in-law license could not be inferred since to confer constructive license would run counter to historic policies underlying statute declaring private disposition of Indian lands to be invalid. 25 U.S.C.A. §§ 81, 84, 177; Act July 22, 1790, § 4, 1 Stat. 138.

29. Indians ⇐15(1)

License cannot be inferred from the attempted granting of an easement in violation of statute generally prohibiting individuals from acquiring lands privately from Indians. 25 U.S.C.A. § 177.

Yvonne T. Knight and Daniel H. Israel (both argued), of Native American Rights Fund, Boulder, Colo., for appellants in 74-3333, for appellees in 75-1080.

John Zimmerman, Atty. (argued), of U. S. Dept. of Justice, Washington, D. C., for appellant in 75-1080.

Donald Oakley Roy (argued), of Kentfield, Cal., for appellees in 74-3333.

Before GOODWIN and WALLACE, Circuit Judges, and WILLIAMS,* District Judge.

WALLACE, Circuit Judge:

This case arises out of a confrontation between the "manifest destiny" of the westward movement of American civilization and the rights of the native American Indians to their lands. It raises important issues of Indian law and requires the interpretation of a century of Indian and public land policy.

The Southern Pacific Transportation Company (Southern Pacific) operates a railway through the reservation of the Walker River Paiute Tribe of Nevada (Tribe). The right-of way has been used continuously by Southern Pacific and its predecessors since 1882. It is now alleged that the railway is and has always been a trespasser.[1]

The Tribe and a class of individual allottees[2] of land traversed by the railway brought suit seeking, among other things, a declaration that the 1880 and 1882 agreements granting Southern Pacific's predecessor the right-of-way are void and that the Indians own the right-of-way, a permanent injunction against future trespass, money damages for trespass and punitive damages. The United States instituted a second suit in its own right and on behalf of the Tribe and allottees seeking to quiet title to the right-of-way in the United States for their use and benefit, ejectment,[3] and damages for trespass. The district court ordered the two actions consolidated. The theory of both suits was that Southern Pacific and its predecessors never obtained a valid right-of-way through the reservation.

[1] The district court granted a partial summary judgment for the Indians and the United States. It ruled that Southern Pacific did not have a valid easement for the railway or adjoining telephone and telegraph lines but that it did have a license for a railway from the time the railroad was constructed in 1882 to the filing of the complaint in this suit.[4] The trial judge certified the partial summary judgment as appealable pursuant to 28 U.S.C. § 1292(b). The Tribe and allottees and the United States appealed and we exercised our dis-

* Honorable David W. Williams, United States District Judge, Central District of California, sitting by designation.

1. These claims are not barred by the applicable statute of limitations. 28 U.S.C. § 2415; *Capitan Grande Band of Mission Indians v. Helix Irrigation District*, 514 F.2d 486 (9th Cir.), *cert. denied*, 423 U.S. 874, 96 S.Ct. 143, 46 L.Ed.2d 106 (1975).

2. The class was certified under Rule 23(b)(1)(B), Fed.R.Civ.P. The class consists of all original allottees and their successors in interest who do not have patents.

3. While the motion for partial summary judgment was pending, the United States filed an amended complaint which omitted the allegations and prayer that the railroad be removed. This change of position by the government concerns us. We cannot be oblivious to the fact that this railroad line services a United States Navy munitions depot. Whether the Justice Department can represent the claims of the Tribe and allottees without a conflict of interest should be examined by the district court on remand.

4. The trial judge held that there was a genuine issue of fact as to whether the license extended to the telephone and telegraph lines. He made no findings on damages for the period after the filing of the complaints and before the entry of judgment or on the propriety of an injunction, ejectment or other relief. These issues were reserved for trial.

erction to entertain the appeals.[6] We reverse the decision on the claims of the class of allottees and remand with directions to dismiss for lack of jurisdiction unless an alternate ground for jurisdiction can be found. We affirm in part and reverse in part the holding that Southern Pacific never acquired an easement, and reverse the finding that it had a license.

I Factual and Procedural Background

The Walker River Reservation was formally established by executive order of President Grant on March 19, 1874.[6] On April 13, 1880, in consideration of the payment of $750 and a promise of free transportation for the Indians and their products along the railway as long as the railroad is operated through the reservation, a special council of the Tribe orally granted D. O. Mills and Associates, later incorporated as the Carson & Colorado Railroad Company, a right-of-way through the reservation. On January 5, 1881, the Carson & Colorado filed maps of definite location with the Department of the Interior seeking thereby to obtain a right-of-way under the General Railroad Right of Way Act of 1875, ch. 152, 18 Stat. 482 (codified at 43 U.S.C. §§ 934-39) (hereinafter referred to as "1875 Act"). These maps were approved by the Secretary on January 29, 1881. The railroad was actually constructed in 1881 and 1882.

On August 9, 1882, the Carson & Colorado entered into a written agreement with the "chiefs, headmen and heads of a majority of families" of the Tribe. Although reciting that the Carson & Colorado believed that "it had honestly and in good faith complied with all legal requirements" for obtaining a right-of-way across the reservation, the agreement granted a right-of-way for the railroad "as now constructed" in consideration of the payment of $750, a promise of free transportation, and certain additional promises. The agreement was expressly made subject to final ratification by Congress. Although four bills were introduced for that purpose, Congress never ratified the agreement.

In 1902 Congress acted to enable part of the reservation to be opened to settlement. By a series of statutes and an agreement allotments of irrigable lands and cash payments were made to individual Indians, tribal grazing and timber lands were set aside and the Indians "cede[d] . . . and relinquish[ed] to the United States all right, title and interest" to the remaining lands in the reservation. In 1906 the relinquished lands were opened by presidential proclamation to settlement "subject to disposal under the existing laws of the United States."[7] In 1925 the Central Pacific Railway Company (successor to the Carson & Colorado and predecessor of Southern Pacific) filed amended maps of definite location with the Department of the Interior for the stated purpose of obtaining the benefits of the 1875 Act. These maps were approved in 1926. Part of the ceded lands were restored to the reservation in 1936.

5. The district judge originally found no just reason for delay and directed that a final judgment be entered pursuant to Rule 54(b), Fed.R.Civ.P. All of the parties then appealed, asserting appellate jurisdiction under 28 U.S.C. § 1291. Since the district court had in effect decided only the issue of liability on the trespass claims, without deciding what relief would be appropriate, the judgment was not final as to one entire claim and therefore not appealable under 28 U.S.C. § 1291. *Liberty Mutual Insurance Co. v. Wetzel*, 424 U.S. 737, 96 S.Ct. 1202, 47 L.Ed.2d 435 (1976). We ordered the appeals dismissed unless the district judge certified the appeals under 28 U.S.C. § 1292(b). He did so and we now have appellate jurisdiction.

All of the issues raised by the prior appeals of the Tribe and allottees, of the United States and of Southern Pacific are now before us. As we interpret the district judge's order, the issues that should be decided now are the same as those which were before us on the initial appeals. In addition, it is necessary to decide the issues raised by Southern Pacific in order properly to dispose of the issues raised in these appeals by the Tribe and allottees and the United States.

6. 1 C. Kappler, Indian Affairs: Laws and Treaties 889 (2d ed. 1904). We have held that the reservation was actually established by administrative action in 1889. *United States v. Walker River Irrigation Dist.*, 104 F.2d 334, 338 (9th Cir. 1939).

7. See p. 683 infra.

The trespass claims of the Tribe and allottees and the United States relate to 50.47 miles of Southern Pacific's railroad line. This challenged segment represents the part of the line within the original 1874 executive order reservation boundaries. After the 1906 cession and allotments, 25.72 miles of the line crossed ceded lands, 17.75 miles traversed tribal lands and 7.0 miles intersected allotted lands. Lands containing 13.25 miles of line were restored to the Tribe in 1956.

II. Jurisdiction of the District Court

The district court had jurisdiction over the Tribe's claims pursuant to 28 U.S.C. § 1362 and over the claims of the United States pursuant to 28 U.S.C. § 1345. Neither statute requires any minimum amount in controversy.

[2] The district court found that it had jurisdiction over the claims of the class of allottees pursuant to 28 U.S.C. § 1331, which requires that the amount in controversy exceed $10,000. The complaint alleged that the amount in controversy exceeded $10,000 "per plaintiff," but Southern Pacific challenged this allegation in its opposition to the plaintiffs' motion for summary judgment. This challenge was timely, Fed.R.Civ.P. 12(h)(3), and shifted the burden to the allottees to show that it does not appear to a legal certainty that their claims are for less than the required amount. *Gibbs v. Buck*, 307 U.S. 66, 72, 59 S.Ct. 725, 83 L.Ed. 1111 (1939); *Saint Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 288-89, 58 S.Ct. 586, 82 L.Ed. 845 (1938).

[3, 4] The district court did not find that the claim of each allottee exceeds $10,000, but instead held that the allottees' claims could be aggregated and sustained jurisdiction on the ground that it did not appear to a legal certainty that the total claim of the class did not exceed $10,000. Southern Pacific has not challenged this holding on appeal, but we are bound to consider jurisdictional defects sua sponte. *Mansfield, C. & L.M. Ry. v. Swan*, 111 U.S. 379, 384, 4 S.Ct. 510, 28 L.Ed. 462 (1884). We conclude that the district court erred in aggregating the allottees' claims to determine whether the jurisdictional amount requirement was met. The claims of the class of allottees must therefore be dismissed unless it appears to the district court on remand that there is no legal certainty that the claim of each allottee does not exceed $10,000 or unless some alternative jurisdictional basis can be found.

[5] Class members may aggregate their claims to satisfy the amount in controversy requirement only where their claims are "joint and common" and not "separate and distinct." *Zahn v. International Paper Co.*, 414 U.S. 291, 293-94, 94 S.Ct. 505, 38 L.Ed.2d 511 (1973); *Snyder v. Harris*, 394 U.S. 332, 335-37, 89 S.Ct. 1053, 22 L.Ed.2d 319 (1969). The district court aggregated the allottees' claims solely on the authority of *Skokomish Indian Tribe v. France*, 269 F.2d 555 (9th Cir. 1959). The Skokomish Tribe claimed certain tidelands under a treaty and executive order. The Tribe brought a trespass and quiet title action against a number of defendants who claimed adverse interests in the lands. Jurisdiction was asserted under 28 U.S.C. § 1331.[8] The complaint alleged that the jurisdictional amount requirement was met but there was no allegation that the requirement was met as to each defendant. We concluded that the claims against the various defendants could be aggregated and that the district court had jurisdiction. We said that all the defendants derived their title from a common source and that "while the land in question is divided into parcels, it comprises essentially a single tract . . . ." 269 F.2d at 559.

[6] From our opinion, it is not clear what factors led us to our conclusion that the land comprised "essentially a single tract" and inferentially that the claimants to the separate parcels would be jointly

8. 28 U.S.C. § 1362, which would have provided jurisdiction without regard to amount in controversy for a suit by an Indian Tribe, was not enacted until 1966. Act of October 10, 1966, Pub.L.No. 89-635, § 1, 80 Stat. 880.

liable to the Tribe.[9] But whatever factors may have dictated that conclusion are clearly not involved here. Our case is controlled by *Potrero Hill Community Action Committee v. Housing Authority*, 410 F.2d 974 (9th Cir. 1969). There, a class of tenants in a federally-financed, low-rent housing project sought a judgment directing local authorities to make improvements allegedly required by terms of the tenants' leases and of the financing agreement with the federal government. Jurisdiction was asserted under 28 U.S.C. § 1331, but the minimum amount in controversy requirement could be satisfied only if the claims of the individual tenants could be aggregated. We said that aggregation is proper only if the tenants' claims "derive from rights which they hold in group status." 410 F.2d at 978. In spite of the common questions of law and fact involved, we then concluded that "their rights appear to arise only from the status of each as individual lessee of a portion of the project," *id.*, and therefore the claims could not be aggregated. *See also City of Inglewood v. City of Los Angeles*, 451 F.2d 948, 953 (9th Cir. 1972); *Alfonso v. Hillsborough County Aviation Authority*, 308 F.2d 724, 726 27 (5th Cir. 1962).

[7, 8] This analysis produces a similar result here. Although the allottees' claims present common questions of law and fact, their rights to exclude trespassers are not held in any group status. Allotments of tribal lands are made to the individual Indians "in severalty" and "in trust for the sole use and benefit of the Indian to whom such allotment shall have been made . . . ." General Indian Allotment Act of 1887 (Dawes Act), ch. 119, §§ 1, 5, 24 Stat. 388-89 (codified at 25 U.S.C. §§ 331, 348). The primary purpose of the allotment policy was to break up tribal life and encourage Indians to live indigidually on their own individual lands.[10] Each allottee has the "full possessory right" to his allotment, which becomes an absolute right of ownership when the trust period expires and fee patents are issued. F. Cohen, Handbook of Federal Indian Law 220 (Univ. of N.M. Press reprint of 1942 ed.). Thus we conclude that, as in *Potrero Hill*, the allottees' rights "arise only from the status of each as individual [allottee] of a portion of the [reservation]" and their claims cannot be aggregated for purposes of satisfying the jurisdictional amount.

The allottees argued in the district court that aggregation of their claims should be permitted under a less technical approach adopted by other courts. *See, e. g.*, *Berman v. Narragansett Racing Association*, 414 F.2d 311 (1st Cir. 1969), *cert. denied*, 396 U.S. 1057, 90 S.Ct. 662, 24 L.Ed.2d 661 (1970); *Haas v. Rockefeller*, 281 F.Supp. 945 (S.D.N.Y.), *vacated as moot*, 484 F.2d 1300 (2d Cir. 1971). To whatever extent those decisions would produce a different result here, however, we conclude that they are contrary to Supreme Court decisions that "separate and distinct" claims may not be aggregated, *Zahn v. International Paper Co.*, *supra*; *Snyder v. Harris*, *supra*, and to the *Potrero Hill* decision in our circuit.[11]

9. The test for aggregating claims of one plaintiff against multiple defendants is essentially the same as that for aggregating claims of multiple plaintiffs against one defendant: the plaintiff's claims against the defendants must be common and undivided so that the defendants' liability is joint and not several. *Walker v. Northeastern R.R.*, 147 U.S. 370, 373-74, 13 S.Ct. 348, 37 L.Ed. 208 (1893); 14 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3704, at 417 (1976).

10. *See* D. Otis, The Dawes Act and the Allotment of Indian Lands 9-10 (1973), *reprinted with minor changes from Hearings on H.R. 7902 Before the House Committee on Indian Affairs*, 73d Cong., 2d Sess., pt. 9, at 428-88 (1934).

11. There is also an argument that the rule of *Zahn* and *Snyder* should be limited to class actions maintained under Rule 23(b)(3), Fed.R. Civ.P., and that any class action meeting the more stringent requirements of Rules 23(b)(1) or (b)(2) should automatically qualify for aggregation. *See* 14 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3708, at 442 44 (1976). The authors note, however, that there is "little hope" for this argument to prevail in light of the Court's "unswerving adherence" in *Zahn* and *Snyder* to the traditional rule. *Id.* at 442. We implicitly rejected the argument in *Potrero Hill* by holding that claims

[9] Thus we conclude that the district court erred in holding that the allottees' claims could be aggregated for purposes of satisfying the jurisdictional amount requirement. We therefore reverse the decision as to the claims of the allottees and remand with directions to dismiss unless the district court concludes that there is not a legal certainty that the claim of each allottee does not exceed $10,000 or unless jurisdiction exists pursuant to some other statute which does not require a minimum amount in controversy.[12]

III. The Contentions of the Parties

The Tribe and the United States object to the district court's conclusion that Southern Pacific and its predecessors enjoyed a license and that until its revocation by the filing of the complaint in this case, it had a right to have its railway run through the reservation. However, whether Southern Pacific had a license is immaterial if it in fact had a valid easement and so we are first called upon to discuss that issue.

[10] All parties agree that Southern Pacific did not obtain a valid easement for a railroad right-of-way by virtue of the 1880 and 1882 agreements alone. At the time of those agreements, § 2116, Rev.Stat. (now 25 U.S.C. § 177) (hereinafter referred to as "section 177"), provided in part:

> No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.

The 1880 and 1882 agreements purport to convey a claim to Indian lands from an Indian tribe and are therefore invalid under section 177.

But section 177 is not applicable to the sovereign United States and Congress clearly has authority to deal with Indian lands. *See Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 119-24, 80 S.Ct. 543, 4 L.Ed.2d 584 (1960). Southern Pacific thus argues that it acquired a right-of-way pursuant to certain acts of Congress. First, it claims that since the Walker River Reservation was created by executive order, it acquired a right-of-way under the 1875 Act by filing maps in 1881. Even though the 1875 Act is expressly not applicable to "any . . . . Indian reservation," § 5, 18 Stat. 483 (43 U.S.C. § 938), Southern Pacific argues either that the Act does apply to executive order reservations or that the reservation was terminated to the extent of the right-of-way by the approval of maps. Second, Southern Pacific argues that it obtained a right-of-way for the railroad as constructed through the reservation under the Act of March 2, 1899, ch. 374, 30 Stat. 990 (codified at 25 U.S.C. §§ 312-18) (hereinafter referred to as the "1899 Act") upon the Act's passage in 1899. Finally, Southern Pacific argues that it obtained a right-of-way under the 1875 Act through the lands ceded by the Indians to the United States and opened by the President to disposal under the public land laws either in 1926 when amended maps of location were approved or in 1906 when the lands were opened to settlement.

of members of a Rule 23(b)(2) class could not be aggregated. 410 F.2d at 976, 978.

12. The Tribe and allottees moved to amend their complaint in the trial court to assert jurisdiction of the allottees' claims under 25 U.S.C. § 345. The district court apparently never ruled on this motion; the decision on summary judgment noted that in light of the court's conclusion that jurisdiction existed under 28 U.S.C. § 1331, the issue of jurisdiction under 25 U.S.C. § 345 need not be reached. We decline to consider at this time whether jurisdiction might be proper under 28 U.S.C. § 345. On remand, the Indians will have an opportunity to amend their complaint, 28 U.S.C. § 1653, and the district court should have the first opportunity to consider the issue.

We note that even if the district court does not have jurisdiction over the class action by the allottees, the United States has raised similar trespass claims with respect to allotted lands, although it is seeking somewhat different relief. The court has jurisdiction to determine the claims raised by the United States and the United States has the capacity to sue for the protection of allotted lands. *Heckman v. United States*, 224 U.S. 413, 32 S.Ct. 424, 56 L.Ed. 820 (1912).

We reject the first two of these contentions and affirm the district court's holding that Southern Pacific does not have a complete easement. We reverse the district court in part, however, and hold that Southern Pacific has a valid easement through the lands ceded in 1906.

After determining the threshold issue of easement, we must next decide whether Southern Pacific had a license. The Tribe and the United States argue that section 177 forbids inferring a license from the 1880 and 1882 agreements and attendant circumstances. We accept this contention and reverse the district court's holding that a license should be inferred.

IV. Right-of-way Under the 1875 Act

The 1875 Act is a general statute granting a right-of-way "through the public lands of the United States" to any railroad company which files its articles of incorporation and proofs of its organization with the Secretary of the Interior. Ch. 152, § 1, 18 Stat. 482 (43 U.S.C. § 934). There is also a provision for the filing of maps of its route. *Id.* § 4, 18 Stat. 483 (43 U.S.C. § 937). Southern Pacific claims to have complied with these requirements. Indeed, the Tribe and the United States admit that the Secretary of the Interior approved the requisite certificates and a map of the railroad in 1881.

The Tribe and the United States argue that Southern Pacific did not acquire a right-of-way by virtue of this approval, however, since the 1875 Act expressly does not apply "to any lands within the limits of any . . . Indian reservation, . . . unless such right of way shall be provided for by treaty-stipulation or by act of Congress heretofore passed."[12] *Id.* § 5 (43 U.S.C. § 935). All parties agree that no such treaty-stipulation or act of Congress exists.

Southern Pacific has two closely related responses. First, it argues that "Indian reservation" as used in the statute refers only to reservations established by treaty or statute and not to reservations established by executive order; therefore, the 1875 Act does apply to the Walker River Reservation. Second, Southern Pacific argues that even if the 1875 Act does not apply to executive order reservations, the approval of maps by the Secretary of the Interior had the effect of terminating the reservation by the Executive to the extent of the right-of-way shown on the maps so that the 1875 Act then can apply to grant the railroad a right-of-way through the terminated part of the reservation. Both of these arguments are based on the special legal status of Indian reservations created by executive order. Before examining the arguments, the status of this type of reservation should be clarified.

A. Special Status of Executive Order Reservations

The historic foundations of Indian law are instructive. In the era of colonial imperialism, the European powers agreed "that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession." *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 573, 5 L.Ed. 681 (1823). While the natives retained the right to occupy their aboriginal lands, title and dominion were in the discoverer who had the exclusive right to extinguish the Indian title by purchase or by conquest. The United States has recognized these principles and has always asserted the rights originally acquired by the European powers by discovery. *Id.* at 572–74, 587–89, 5 L.Ed. 681.

[11, 12] The early practice of the United States was to deal with the Indians by treaty. Great tracts of Indian lands were purchased and the Indian tribes were gradually moved westward. Even though Indian rights to possess tribal lands might be

12. When codified, the term "passed prior to March 3, 1875" was substituted for "heretofore passed."

guaranteed by treaty, Congress retains plenary authority to control the use of such lands, to grant adverse interests and to extinguish Indian title completely. *See* Cohen, Federal Indian Law, *supra*, at 94–96. Abrogation of Indian treaty rights is not lightly inferred from congressional acts, however. *See generally* Wilkinson & Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows Upon the Earth"—How Long a Time Is That?*, 63 Calif.L.Rev. 601 (1975). Abrogation of treaty rights is also subject to constitutional limitation—such property rights cannot be taken without payment of just compensation. *United States v. Creek Nation*, 295 U.S. 103, 110, 55 S.Ct. 681, 79 L.Ed. 1331 (1935).

In 1871 Congress banned any further use of the treaty power in dealing with the Indians. Act of March 3, 1871, ch. 120, § 1, 16 Stat. 566 (codified at 25 U.S.C. § 71).[14] After the period of treaty-making, much of the responsibility for reserving parts of the public domain for Indian use shifted from Congress to the Executive. Although Indian reservations had been created by executive order as early as 1855, *see* Cohen, Federal Indian Law, *supra*, at 290, the authority of the President and the nature of the Indians' rights with respect to such reservations were matters of doubt in the 1870's and 1880's.

Most of these doubts have now been resolved. The Supreme Court has held that Congress delegated to the President the power to reserve public lands from disposition under the public land laws for Indians or for other purposes by long-continued acquiescence in the exercise of that power. *United States v. Midwest Oil Co.*, 236 U.S. 459, 35 S.Ct. 309, 59 L.Ed. 673 (1915); *see Grisar v. McDowell*, 73 U.S. (6 Wall.) 363, 381, 18 L.Ed. 863 (1868). The courts have held that as long as an executive order creating a reservation remains in effect, the Indian title to the reservation lands deserves the same protection as the Indian title to reservations created by treaty or statute. *Spalding v. Chandler*, 160 U.S. 394, 404, 16 S.Ct. 360, 40 L.Ed. 469 (1896); *Gibson v. Anderson*, 181 F. 89, 41 42 (9th Cir. 1904); *McFadden v. Mountain View Mining & Milling Co.*, 97 F. 670, 673 (9th Cir. 1899), *rev'd on other grounds*, 180 U.S. 533, 21 S.Ct. 455, 45 L.Ed. 656 (1901). Congress also, at least in practice, has not discriminated against executive order reservations. *See* Note, *Tribal Property Interests in Executive-Order Reservations: A Compensable Indian Right*, 69 Yale L.J. 627, 636 (1960).

One distinguishing feature of Indian rights in executive order reservations has appeared, however. Before Congress prohibited future changes in Indian reservations by executive order,[15] it was common practice for the President to terminate or reduce in size executive order reservations without payment of compensation. *See* 34 Op.Atty.Gen. 181, 186–89 (1924). The legality of this practice was finally settled when the Supreme Court held that although Congress had delegated to the President the power to create reservations, it had never delegated the power to confer compensable property interests in the Indians. *Sioux Tribe of Indians v. United States*, 316 U.S. 317, 325 28, 62 S.Ct. 1095, 86 L.Ed. 1501 (1942). There the Court found no congressional recognition of the existence of compensable tribal property interests in a reservation created by executive order in 1875 and terminated in 1884. It therefore held that no right to compensation existed upon the termination of such a reservation. *Id.* at 331, 62 S.Ct. 1095.

14. This statute resulted from dissatisfaction of the House of Representatives with the practical denial to it of any role in making Indian policy by the exclusiveness of Senate power under the Constitution (art. II, § 2, cl. 2) to ratify treaties. *See Antoine v. Washington*, 420 U.S. 194, 202, 95 S.Ct. 944, 43 L.Ed.2d 129 (1975); S. Tyler, A History of Indian Policy 79 (1973).

15. The creation of new executive order reservations was prohibited by the Act of June 30, 1919, ch. 4, § 27, 41 Stat. 34 (codified at 43 U.S.C. § 150) and changes in the boundaries of existing reservations by executive order were prohibited by the Act of March 3, 1927, ch. 298, § 4, 44 Stat. 1347 (codified at 25 U.S.C. § 398d).

Although it has been argued that in 1927 Congress recognized compensable tribal property interests in executive order reservations, see Note, *Tribal Property Interests*, *supra*, 60 Yale L.J. at 687, none of the parties contends that Congress had recognized any such rights of the Walker River Tribe to its reservation as of 1881 when the railroad was constructed.

[13] Thus, the status of executive order reservations can be summarized as follows: the Indians have the exclusive right to possession but title to the lands remains with the United States. Congress has plenary authority to control use, grant adverse interests or extinguish the Indian title. In these respects, executive order reservations do not differ from treaty or statutory reservations. The one difference is that so long as Congress has not recognized compensable interests in the Indians, executive order reservations may be terminated by Congress or the Executive without payment of compensation. In light of this background, we now turn to the specific arguments advanced by Southern Pacific.

B. Does the 1875 Act Apply to Executive Order Reservations?

[14, 15] The first issue raised by Southern Pacific is a matter of statutory construction which is easily resolved in favor of the Indians. Southern Pacific asserts at the outset that the 1875 Act should be liberally construed to effectuate its purposes. *Great Northern Ry. v. United States*, 315 U.S. 262, 272, 62 S.Ct. 529, 86 L.Ed. 836 (1942); *Great Northern Ry. v. Steinke*, 261 U.S. 119, 124, 43 S.Ct. 316, 67 L.Ed. 564 (1923). Since, however, the specific provision in question is an exclusion of Indian reservations from the "public lands" available under the statute for railroad rights-of-way, a different rule of construction comes into play: statutes enacted for the protection of Indians must be broadly construed in the Indians' favor. *See Antoine v. Washington*, 420 U.S. 194, 199–200, 95 S.Ct. 944, 43 L.Ed.2d 129 (1975); *Morton v. Ruiz*, 415 U.S. 199, 236, 94 S.Ct. 1055, 39 L.Ed.2d 270 (1974). After examining the language of the 1875 Act, its legislative history and the interpretations placed upon it by Congress and the Department of the Interior in the light of this rule of construction, we conclude that Congress intended to exclude executive order reservations from application of the Act.

The 1875 Act, by its own terms, does "not apply to any lands within the limits of any . . . Indian reservation, . . . unless such right of way shall be provided for by treaty-stipulation or by act of Congress heretofore passed."[16] Ch. 152, § 5, 18 Stat. 483 (43 U.S.C. § 938). The exclusion from the Act of *any* Indian reservation obviously must include executive order reservations. Southern Pacific points to the "treaty-stipulation or by act of Congress heretofore passed" language as limiting "any . . . Indian reservation" to treaty or statutory reservations. But Southern Pacific has taken the phrase completely out of context. The phrase appears in the clause "unless such right of way shall be provided for by treaty-stipulation or by Act of Congress . . . ." Manifestly, it is the "right of way" and not the "Indian reservation" which must be provided for by treaty or prior act of Congress.

Southern Pacific next claims that the reference to treaty-stipulation or prior act of Congress at least creates an ambiguity since "by definition, as to executive order reservations, Congress would not have 'heretofore passed' legislation." This suggestion is without merit. While it is true that Congress by definition would not have "heretofore passed" legislation establishing executive order reservations, it does not follow that Congress by definition would not have "heretofore passed" legislation granting rights-of-way across such reservations. While we cannot cite examples of such legislation passed before 1875,[17] there

16. See note 13 *supra*.

17. Most of the large western executive order reservations were not created until after 1871. *See* 1 Kappler, *supra* note 6, at 801–934.

are numerous examples of such legislation enacted after 1875.[18] Thus the language of the statute is in no way inconsistent with a congressional intent to exclude all Indian reservations, including executive order reservations, from application of the 1875 Act.

Even if we were to conclude that the 1875 Act is ambiguous on this point, however, our examination of the legislative history of the Act and the subsequent interpretations of it by Congress and the Department of the Interior leads us to construe it as not applying to executive order reservations. The issue was extensively debated on the floor of the Senate. The original Senate bill did not expressly except Indian reservations from its application. When such an amendment was offered, several Senators objected, contending that because of the great extent of executive order reservations in the territories and the "fugitive and floating" nature of Indian property rights in such reservations, a blanket prohibition of right-of-way grants through those reservations would unnecessarily impede railroad development in the unsettled West. Thus Senator Sargent offered an alternative amendment which would have allowed the Secretary of the Interior to approve right-of-way grants through executive order reservations. 2 Cong.Rec. 2688–89 (1874).

The views represented by this proposal, however, failed to carry the day. The opposition's response was that even though the federal government may have the power to terminate an executive order reservation or sanction an invasion of such a reservation by a railroad, it would not be wise to do so as a matter of policy. *Id.* at 2690 (remarks of Senator Hamilton).

Thus it appears that the problem of executive order reservations was explicitly brought to the attention of Congress in the debates leading to the 1875 Act. The Act was nevertheless phrased so as not to apply to "any . . . Indian reservation." It is therefore not open to Southern Pacific to argue that the purpose of the Act would be better effectuated if it did apply to executive order reservations—that issue was resolved against Southern Pacific and in favor of the Tribe by Congress in 1875.

This construction of the Act is consistent with the interpretation placed upon it by the Secretary of the Interior. Contrary to Southern Pacific's argument that the Department of the Interior has always considered the Secretary's approval of maps in 1881 as conferring a valid right-of-way under the 1875 Act, the Secretary at the time considered the approval of maps a mistake. As soon as the fact that the railroad crossed the Walker River Reservation was brought to the Secretary's attention, he directed that an agreement between the Indians and railroad be drawn up and submitted to Congress for ratification.[19] To this day the Bureau of Indian Affairs has no record of any grant of a right-of-way under a treaty or convention pursuant to 25 U.S.C. § 177, or under any other congressional act, general or special.

The construction of the 1875 Act adopted here is also consistent with the interpretation of the Act apparently accorded to it by Congress. Thus in the years after passage of the 1875 Act, but before passage of the 1899 Act generally granting railroad rights-of-way across Indian reservations, Congress passed a number of special statutes granting rights-of-way to specific railroads across specific executive order reservations.[20]

18. See note 20 *infra*.

19. *See* S.Exec.Doc.No.17, 48th Cong., 1st Sess. 4 5 (1885). The Commissioner of Indian Affairs wrote to the Secretary of the Interior on December 4, 1882:

> Section 5 of the [1875 Act] expressly excepting Indian reservations . . . "unless such right of way shall be provided for by treaty stipulations or by act of Congress heretofore passed," and, no such provision being extant in the case of the Walker River Reservation (which . . . was created by executive order), it appeared to this office that the authority to grant a right of way through the reservation rested in Congress alone . . .

Id. at 4. The Secretary agreed and instructed the Indian office to obtain an agreement for submission to Congress. *Id.*

20. *E. g.*, Act of August 5, 1882, ch. 384, 22 Stat. 298 (right-of-way across the Papago Reserva-

That Congress did not consider the 1875 Act applicable to executive order reservations is made even more clear by a clause in at least one of those statutes to the effect that "all the provisions of [the 1875 Act] are hereby declared to be applicable [to the right-of-way granted by this special statute] to the same extent as though the lands in said reservation were open to settlement and sale." Act of March 6, 1896, ch. 42, 29 Stat. 45 (granting right-of-way across the Colville Reservation, established by executive order of President Grant, July 2, 1872, 1 Kappler, *supra* note 6, at 916). If Congress considered the 1875 Act applicable to executive order reservations, this clause would be superfluous.

[16] We hold that the General Railroad Right of Way Act of 1875 does not apply to executive order reservations and that the attempted compliance with that Act in 1881 by the Carson & Colorado and the Interior Department was therefore not effective to perfect a right-of-way through the Walker River Reservation.

C. Was the Reservation Terminated by Approval of Maps?

Southern Pacific's second argument is more subtle. It claims that even if the 1875 Act does not apply to executive order reservations, it still obtained a right-of-way under the Act when the maps of definite location were approved by the Secretary of the Interior in 1881. It asserts that the Secretary had the authority to return lands reserved by executive order to the public domain for disposition under the public land laws and that the effect of the Secretary's approval of maps in 1881 was to terminate the reservation to the extent of the right-of-way sought. Once the reservation was terminated in this manner, the 1875 Act could simultaneously apply to grant the railroad the right-of-way sought.

[17, 18] We reject this argument. We note that while the executive branch has broad authority to withdraw public lands from disposition under the public land laws for the benefit of Indians and to manage the disposition of Indian lands, *see United States v. Consolidated Mines & Smelting Co.*, 455 F.2d 432, 442-44 (9th Cir. 1971); *United States v. Barnsdall Oil Co.*, 127 F.2d 1019 (10th Cir. 1942), the source of this authority is congressional acquiescence in its exercise. *See United States v. Midwest Oil Co.*, *supra*, 236 U.S. at 472-75, 35 S.Ct. 309; *Sioux Tribe of Indians v. United States*, *supra*, 316 U.S. at 326, 62 S.Ct. 1095. Since the authority is delegated by Congress, its exercise can be regulated by Congress. In 1875 Congress granted rights-of-way to railroads through public lands but specifically provided that the grants not be made through Indian reservations. This provision implicitly denied the Secretary whatever authority he might previously have had to terminate an executive order reservation to the extent of a requested railroad right-of-way merely by approval of maps of definite location. Were we to hold otherwise, we would completely subvert the determination of Congress that railroad rights-of-way should not be granted

tion established by executive order of President Grant, July 1, 1874, 1 Kappler, *supra* note 6, at 806); Act of February 18, 1887, ch. 130, 24 Stat. 402 (right-of-way across the Fort Berthold Reservation established by executive order of President Hayes, July 13, 1880, 1 Kappler, *supra*, at 883); Act of May 30, 1888, ch. 336, 25 Stat. 160 (right-of-way across the Coeur d'Alene Reservation established by executive order of President Grant, November 8, 1873, 1 Kappler, *supra*, at 847); Act of May 8, 1890, ch. 196, 26 Stat. 102 (right-of-way across the Colville Reservation established by executive order of President Grant, July 2, 1872, 1 Kappler, *supra*, at 916); Act of February 18, 1895, ch. 95, 28 Stat. 680 (right-of-way across the San Carlos division of the White Mountain Reservation, established by executive order of President Grant, December 14, 1872, 1 Kappler, *supra*, at 912-13); Act of March 6, 1896, ch. 42, 29 Stat. 44 (right-of-way across the Colville Reservation); Act of June 4, 1898, ch. 377, 30 Stat. 430 (same); Act of June 18, 1898, ch. 468, 30 Stat. 475 (same).

These special statutes typically granted rights-of-way narrower than the 100 feet on each side of the road granted by the 1875 Act (43 U.S.C. § 934). The statutes also typically made some provision for obtaining the Indians' consent to construction of the railroad and for the payment of compensation.

through executive order reservations under the 1875 Act.

We recognize that even after 1875, the President or the Secretary of the Interior could still alter the boundaries of, or even extinguish completely, an executive order reservation in order to make way for a railroad. But that clearly is not what was done here. First, the Secretary's approval of maps does not purport to terminate the reservation. The affidavit submitted with the maps by the president of the Carson & Colorado recites "that the maps have been prepared to be filed for the approval of the Secretary of the Interior, in order that the company may obtain the benefits of the [1875 Act]." The Secretary's approval is then noted on the same page: "Dept. of the Interior, 29th January 1881. Approved. C. Schurz Secretary." The maps clearly indicate the Walker River Reservation boundaries with no mention of their being altered.

Secondly, the Secretary obviously did not intend his approval of the maps to terminate the reservation to the extent of the right-of-way. As pointed out earlier, he considered his approval of the maps a mistake and instructed the railroad to procure an agreement with the Indians to be ratified by Congress.

Finally, even if the Secretary intended to terminate the reservation, he could not do so by such informal means as approval of maps submitted under the 1875 Act. We have held that revocation of withdrawals from public land for reservation use may not be accomplished "by circumstances or procedures less formal than those attending [the withdrawal, or else] confusion would be encouraged in the field of property law, a field in which certainty has undisputed advantages." *United States v. Consolidated Mines & Smelting Co.*, *supra*, 455 F.2d at 466. The Walker River Reservation was created when the Indian Commissioner asked the Commissioner of the General Land Office to respect the reservation in future public surveys and to direct the local land offices to respect the reservation on their books in the meantime. *See United States v. Walker River Irrigation District*, 104 F.2d 334, 338 (9th Cir. 1939). These actions were later ratified by executive order of President Grant, March 19, 1874. 1 Kappler, *supra* note 6, at 869.

In contrast, the approval of maps in 1881 which allegedly terminated part of the reservation was not accompanied by these formalities. Never was there a direction to the General Land Office that the reservation boundaries had been changed; nor was there an executive order ratifying the act. We conclude that no right-of-way was acquired through the Walker River Reservation under the 1875 Act by erroneous approval of maps by the Secretary.

V. Right-of-Way Under the 1899 Act

In 1899 Congress enacted a general statute granting rights-of-way through Indian reservations to "any railroad company organized under the laws of the United States, or of any State or Territory, which shall comply with the provisions of this Act and such rules and regulations as may be prescribed thereunder . . . ." Act of March 2, 1899, ch. 374, § 1, 30 Stat. 990 (codified at 25 U.S.C. § 312). Southern Pacific contends that it acquired a right-of-way under the 1899 Act upon its becoming effective either by: (1) construction of the railroad in 1882, or (2) "de facto" compliance with the requirements of the Act in 1881 and 1882.

The district court began its analysis of these contentions by noting: "Since the railroad lines here in question were built between 1880 and 1882, the question with respect to the Act of 1899 becomes whether it is to be given retroactive application." The court then concluded that the 1899 Act did not contain the clear expression of intent required to construe a statute as retroactive. This reasoning, however, does not meet Southern Pacific's argument. It is not contending that the 1899 Act applied retroactively to grant a right-of-way effective from the railroad's construction in 1882. It contends only that it acquired a right-of-way under the Act upon its becoming effective in 1899. This argument leaves open the claims of the Tribe and the United

States that the railroad was a trespasser from 1882 to 1899, but it does not call for retroactive application of the 1899 Act. But even though we do not accept the district court's reasoning, we reach the same result and reject Southern Pacific's claims that it acquired a right-of-way under the 1899 Act.

First, we reject the contention that construction of the railroad alone is sufficient to acquire a right-of-way under the Act. Southern Pacific relies on cases decided under the 1875 Act, section 1 of which provides: "[A] right of way through the public lands . . . is hereby granted to any railroad company . . . which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization . . . to the extent of one hundred feet on each side of the central line of said road . . ." Ch. 152, 18 Stat. 482 (43 U.S.C. § 934). The courts have held that this is a grant *in praesenti* to an unidentified grantee of an unspecified right-of-way. The grantee is identified by filing its articles and proofs of organization. The right-of-way may be specified in advance of construction by the filing and approval of maps of location pursuant to section 4 of the 1875 Act. 18 Stat. 483 (43 U.S.C. § 937); *Jamestown & N. R. R. v. Jones*, 177 U.S. 125, 131, 20 S.Ct. 568, 44 L.Ed. 696 (1900). Alternatively, the right-of-way may be specified by actual construction of the railroad without ever filing maps. *Id.* at 130-32, 20 S.Ct. 568.

[19] Southern Pacific argues that since the language, requirements, principles and policies of the 1899 Act are similar or identical to those of the 1875 Act, the 1899 Act should be construed in the same way: a right-of-way may be acquired by filing the company's articles and proofs of organization and by actual construction of the railroad. This contention is wholly without merit. The granting clause of the 1899 Act is significantly different from that of the 1875 Act. Section 1 of the 1899 Act grants the right-of-way "to any railroad company . . . which shall comply with the provisions of this Act . . . ." Ch. 374, 30 Stat. 990 (25 U.S.C. § 312). The grantee under the Act is therefore not identified merely by filing articles and proofs of organization as under the 1875 Act; the grantee must in addition comply with all the provisions of the Act including the requirements that maps be filed and approved and that compensation be paid to the Indians. *Id.* § 3, 30 Stat. 991 (25 U.S.C. § 314). Construction of the railroad is clearly not sufficient to acquire a right-of-way grant under the 1899 Act.

Southern Pacific's second contention, that the 1899 Act applies to railroads constructed before passage of the Act where there was "de facto" compliance with the requirements of the Act is more difficult. The Tribe and the United States contend that the 1899 Act should be construed as not applying to railroads already constructed whether or not there was de facto compliance with the requirements of the Act. They cite the language of the Act and the regulations promulgated thereunder as indicating that only lines to be constructed in the future are included.

We do not find much assistance in this language, however. Some of the provisions cited do not refer to construction at all but only specify conditions precedent to effectiveness of the grant. For example, section 3 of the Act provides that "before the grant . . . shall become effective a map . . . must be filed with and approved by the Secretary . . . and the company must make payment to the Secretary . . . for the benefit of the tribe . . ." *Id.* (25 U.S.C. § 314). This provision by itself does not preclude the grant's becoming effective long after construction of the railroad.

Other provisions seem to presume that the railroad to be constructed in the future without necessarily precluding application of the Act to an existing railroad. For example, there is a proviso in section 1 of the Act "[t]hat no right of way shall be granted . . . until the Secretary . . . is satisfied that the company [has the] . . . intent and ability to con-

struct said road . . . . ." *Id.*, 30 Stat. 990 (25 U.S.C. § 312). This provision obviously contemplates an application made in advance of construction, but intent and ability to construct cannot be more effectively demonstrated than by completed construction.

The language of the 1875 Act generally contemplates that the railroads would be constructed in the future but that Act nevertheless has been held to apply to railroads constructed before 1875. *Rio Grande W. Ry. v. Stringham*, 38 Utah 113, 119-20, 110 P. 868, 870-71 (1910), *aff'd*, 239 U.S. 44, 36 S.Ct. 5, 60 L.Ed. 136 (1915). That decision, however, was based on an inferred contemporaneous interpretation of the Act by the Secretary of the Interior. Here the Tribe argues that the Secretary interpreted the 1899 Act as not applying to previously constructed railroads. Thus in 1901 the Department of the Interior took the position that it was necessary for Congress to ratify an agreement between the Devils Lake Tribe and the Jamestown & Northern Railway granting a right-of-way across the reservation for a previously constructed railroad. The sponsoring congressman explained that the bill was necessary "because the general law passed since [the last treaty with the Tribe--presumably the 1890 Act] on the subject is not applicable to this particular location." 34 Cong.Rec. 3482 (1901) (remarks of Mr. Spalding).

Southern Pacific properly notes that the Devils Lake episode does not provide a clear picture of the Department of the Interior's position. The Jamestown & Northern had contracted with the Indians for a 200-foot right-of-way, see Act of March 3, 1901, ch. 869, 31 Stat. 1447, but the 1899 Act grants only 100 feet. If the Jamestown & Northern insisted upon 200 feet, congressional ratification would be necessary even if the company could acquire 100 feet under the 1899 Act. This possibility is as consistent with the documents cited by the Tribe as its contention that the Department of the Interior did not consider the 1899 Act applicable to any previously constructed railroad. Therefore, we do not rest our decision on a contemporaneous administrative construction of the 1899 Act which holds that Act inapplicable to pre-existing railroads.

Without deciding whether the 1899 Act might apply to a pre-existing railroad in a proper case, we hold that Southern Pacific's predecessors did not comply with the 1899 Act here. Section 3 of the Act requires that the company pay the Indians full compensation "which compensation shall be determined . . . under the direction of the Secretary of the Interior, in such manner as he may prescribe." 30 Stat. 991 (25 U.S.C. § 314). The regulations provide: "[T]he United States Indian agent, or a special United States Indian agent, or Indian inspector, will be designated to determine such compensation and damages, subject to the approval of the Secretary of the Interior." 44 L.D. 463 (1916).

[20, 21] Southern Pacific contends that it complied with these requirements by paying the Tribe $750 pursuant to the 1880 and 1882 agreements. It appears from congressional documents cited by the parties that the Commissioner of Indian Affairs and the Secretary of the Interior "approved" the 1882 agreement before submitting it to Congress for ratification. S.Exec.Doc. No.17, 49th Cong., 1st Sess. 1, 2 (1886). As we read the Act and regulations, however, they do not allow for independent negotiations between the railroad and the Indians even if the compensation is later approved by the Secretary of the Interior. The 1899 Act was meant to protect fully Indian interests, see H.R.Rep.No.1806, 55th Cong., 3d Sess. 2 (1899), and we are thus obliged to construe the Act and the regulations strictly in the Indians' favor. *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89, 39 S.Ct. 40, 63 L.Ed. 138 (1918). The regulations require that the compensation be determined in the first instance by the United States Indian agent or other designated official, subject to the Interior Secretary's approval. We cannot permit Southern Pacific to bypass this procedure which was apparently designed to preclude approval without the recommendation of an

impartial Indian expert who has personally evaluated the situation.

[22] We also conclude that the compensation should be determined as of the date the grant of the right-of-way is to be effective. Here Southern Pacific seeks a grant effective in 1899, but the compensation was negotiated and paid in 1880 and 1882. The value of the right-of-way may have changed significantly in the intervening 17 years. Thus we cannot conclude that the procedure for determining compensation followed here achieved even de facto compliance with the 1899 Act. We therefore reject Southern Pacific's argument that it acquired a right-of-way under the 1899 Act.

VI. Right-of-Way Through Lands Ceded in 1906

[23] We next consider whether Southern Pacific obtained a right-of-way under the 1875 Act through reservation lands ceded to the United States in 1906.

In an annual appropriations bill in 1902, Congress acted to enable part of the reservation to be opened to settlement. The Secretary of the Interior was directed to allot the irrigable lands on the Walker River Reservation to the resident Indians. Twenty acres were to be allotted to each family head and the remainder to other Indians, not to exceed 20 acres each. When the majority of heads of families had accepted allotments and agreed to relinquish the non-irrigable part of the reservation, each family head allottee was to receive $300 and the relinquished lands were to be opened by presidential proclamation "to settlement, to be disposed of under existing laws." Funds to pay the Indians were appropriated. Act of May 27, 1902, ch. 888, 32 Stat. 260-61. Congress later directed the Secretary of the Interior to set aside, before the lands were opened to settlement, non-irrigable grazing and timber lands for use by the Indians in common. Resolution of June 19, 1902, No. 31, 32 Stat. 744 (grazing); Act of June 21, 1906, ch. 3504, 34 Stat. 358 (timber).

On July 24, 1906, the Indians agreed, in consideration of the allotments[21] and cash payments provided by the 1902 Act, to "cede, grant and relinquish to the United States all right, title and interest" to the remaining reservation lands. By presidential proclamation of September 26, 1906, these relinquished lands were "opened to settlement, [to] be subject to disposal under the existing laws of the United States." 34 Stat. 3237 38.

Part of Southern Pacific's line crosses the relinquished lands. It argues that it acquired a valid right-of-way through these lands under the 1875 Act either when the lands were opened to settlement or when amended maps of definite location were approved in 1928.

The district judge rejected both of these contentions. He concluded first that the reservation boundaries had not been changed by the relinquishment and that, therefore, the ceded lands were still "within the limits of any . . . Indian reservation," which would prevent an easement due to section 5 of the 1875 Act, 18 Stat. 483 (43 U.S.C. § 938). But the district court also held that the United States took an unrestricted title to the ceded lands and did not take as trustee for the Indians. Therefore, the ceded lands were "public lands" within the meaning of section 1 of the 1875 Act, 18 Stat. 482 (43 U.S.C. § 934), and a railroad easement could be secured. Faced with this apparent conflict between sections 1 (right-of-way granted through "public lands") and 5 (Indian reservations excluded) of the 1875 Act, the district court held that section 5 supersedes and controls. No right-of-way could therefore be obtained through the ceded lands.

While this result may seem acceptable at first blush, it appears unreasonable upon examination of the interface between the 1875 and 1899 Acts. If the ceded lands remain "within the limits of any . . . Indian reservation" and therefore the exclusion in the 1875 Act prevents a right-of-

21. These allotments were made to the predecessors in interest of the allottees denied participation in the suit. See pp. 682-683, supra.

way, then presumably the 1899 Act granting rights-of-way "through Indian reservation," 30 Stat. 990 (25 U.S.C. § 312), does apply. Thus under the district court's reasoning, if a railroad is to obtain a right-of-way through such ceded lands, it must, pursuant to the 1899 Act, pay the Indians full compensation for the right-of-way and comply with a number of other requirements for the benefit and protection of the Indians. Yet under the terms of the cession agreement, the Indians have already been paid in full for the ceded lands by cash payments and individual allotments and they have relinquished "all right, title and interest" in those lands. Thus, as the district court interprets the 1875 Act, application of the 1899 Act would result in a windfall of double payment to the Indians and unnecessarily burdensome requirements for obtaining a railroad right-of-way.

The only alternatives to obtaining a right-of-way under the 1899 Act would be to seek a special act of Congress or to forego a right-of-way altogether. The first alternative is inconsistent with the purpose of the two general railroad right-of-way acts: to free Congress from the burden of applications for special right-of-way legislation. *See* H.R.Rep. No. 1896, 55th Cong., 3d Sess. 1 (1899). The second is contrary to the congressional policy of encouraging western settlement by promoting the extension of railroads. *See United States v. Denver & R. G. Ry.*, 150 U.S. 1, 8, 14 S.Ct. 11, 37 L.Ed. 975 (1893).

However, we are not compelled to reach this result. Assuming first, as the district judge did, that the reservation boundaries were not altered by the 1906 cession, the apparent conflict between sections 1 and 5 of the 1875 Act can be resolved by construing a statute which is even more specific. The 1902 statute initiating the cession negotiations provided that all non-irrigable lands in the reservation be purchased for a lump sum and opened to settlement, "to be disposed of under existing laws." 32 Stat. 261. Since the stated purpose of the statute is to open the ceded lands to settlement, we conclude that the "existing laws" which Congress made applicable to the ceded lands are those laws relating to the disposition of public lands, including, as the district judge recognized, the 1875 Act. This 1902 statute, as implemented by the cession agreement and presidential proclamation, constitutes a special statutory exception to the broad exclusion of Indian reservations from application of the 1875 Act. While in general the 1875 Act does not apply to lands "within the limits of any . . . Indian reservation," we conclude that it applies to the ceded lands within the Walker River Reservation because in 1902 Congress expressly directed that it should.

[24] But even if the 1902 statute is ambiguous on this point, we reach the same result. We find that, contrary to the district judge's assumption, the 1906 cession altered the boundaries of the reservation so that the ceded lands were no longer "within the limits of" the reservation. The ceded lands were thus available for a right-of-way grant under section 1 and not within the exclusion of section 5 of the 1875 Act.

The 1906 cession is a special variant of a general policy embodied in the General Indian Allotment Act of 1887 (Dawes Act), ch. 119, 24 Stat. 388 (codified at 25 U.S.C. § 331 *et seq.*).[22] The Dawes Act granted the President discretionary power to allot reservation lands to the resident Indians in severalty. The Indians were to receive patents inalienable for 25 years and the benefits of United States citizenship. The idea was to "civilize" the Indian by forcing him to abandon tribal life and take up the ways of the white farmers. As ancillary benefit for western land interests was that the "surplus" reservation lands remaining after allotments were to be purchased from the Indians and opened to settlement.[23]

22. The policy of allotment and sale of surplus reservation lands was repudiated in 1934 by the Indian Reorganization Act, ch. 576, 48 Stat. 984 (amended and codified at 25 U.S.C. §§ 461 *et seq.*).

23. For an extended treatment of allotment policy, see generally Otis, The Dawes Act and the Allotment of Indian Lands, *supra* note 10.

In view of the discretionary nature of the presidential power under the Dawes Act to open reservations for allotment, Congress has from time to time enacted special legislation to assure that a particular reservation was subject to allotment. *Mattz v. Arnett*, 412 U.S. 481, 496-97, 93 S.Ct. 2245, 37 L.Ed.2d 92 (1973). The statutes opening the Walker River Reservation to settlement are examples of such special legislation.

Although the ultimate aim of the general policy of allotment was the abolition of Indian reservations, a reservation was not necessarily terminated or diminished by the first step of allotment and sale of surplus lands. The effect of opening a reservation to settlement on the reservation boundaries has most frequently been discussed in the context of exclusive federal jurisdiction over prosecutions for certain crimes committed within "Indian country," defined to include "all land within the limits of any Indian reservation." 18 U.S.C. § 1151(a). Most of the cases have held that reservation boundaries are not changed by allotment and sale of surplus lands. E. g., *Mattz v. Arnett*, *supra*, 412 U.S. at 496-506, 93 S.Ct. 2245; *Seymour v. Superintendent*, 368 U.S. 351, 82 S.Ct. 424, 7 L.Ed.2d 346 (1962); *United States ex rel. Condon v. Erickson*, 478 F.2d 984 (8th Cir. 1973). But the cases have not announced a fixed rule. Rather, they have concluded that a congressional determination to terminate (and inferentially to diminish) an Indian reservation must be express or be clear from the surrounding circumstances and legislative history. *Mattz v. Arnett*, *supra*, 412 U.S. at 505, 93 S.Ct. 2245.

Based upon these cases, it may have appeared to the district judge at the time he decided this case that a special allotment statute would be construed strictly so as to rebut a claim that a reservation had been terminated or diminished by the statute. But subsequent to this decision, the Supreme Court distinguished *Mattz* and *Seymour* and found an implied intent to diminish a reservation in a special allotment statute. *DeCoteau v. District County Court*, 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975).

After examining all the circumstances of this case, we conclude that the 1906 cession did alter the Walker River Reservation boundaries by removing the relinquished lands from "within the limits of" the reservation. The most significant circumstances leading us to this conclusion are the language and terms of the cession agreement itself and the subsequent treatment of these lands by Congress and the Interior Department.

[25, 26] The cession language of the agreement here is virtually identical to the language construed in *DeCoteau*. The Tribe agreed to "cede, grant and relinquish . . . all right, title and interest." As the Court noted in *DeCoteau*, this language is "precisely suited" to the purpose of terminating the reservation status of the ceded lands. *Id.* at 445, 95 S.Ct. 1082.[24] Also

24. *Ash Sheep Co. v. United States*, 252 U.S. 159, 40 S.Ct. 241, 64 L.Ed. 507 (1920), cited by the district court, is not to the contrary. There the Crow Indians of Montana had ceded part of their reservation lands to the United States using language virtually identical to that used by the Tribe here. Sheepowners then pastured some 5,000 sheep on the ceded lands without the Indians' consent and the United States sued for the statutory penalty provided by Rev.Stat. § 2117 (now 25 U.S.C. § 179). The issue was not whether the lands were within the limits of a reservation, but whether the lands "belong[ed] to any Indian or Indian tribe." The government had not paid the Indians a fixed sum for the lands but instead promised to use the proceeds of any sales to settlers for the Indians' benefit. The Court held that as long as the United States retained title, it held it in trust for the Indians. The lands thus "belong[ed] to" the Indians within the meaning of the statute regardless of the reservation status of the lands.

Neither is *Clarke v. Boyum*, 39 F.2d 810, 812-15 (10th Cir. 1930), also cited by the district court, to the contrary. The facts of that case were similar to those in *Ash Sheep*: the Shoshone and Arapahoe tribes ceded part of their reservation to the United States; proceeds from the sales of these lands were to be applied to the Indians' benefit. Act of March 3, 1905, ch. 1482, 33 Stat. 1016. Before the ceded lands were sold, a railroad attempted to obtain a right of way under the 1899 Act. Later purchasers contended that the right of way was invalid because the 1899 Act did not apply to the ceded lands. The court rejected this contention, not because the lands were still part of

as *DeCoteau*, the agreement here vests in the Tribe a sum certain ($300 per family head allottee) for the ceded lands, instead of merely providing that the uncertain future proceeds of sales of the opened lands be applied for the Indians' benefit."[38]

Finally, the legislative history of a later statute adding land, including significant amounts of land ceded in 1906, to the Walker River Reservation indicates that Congress and the Interior Department treated the earlier cession as having diminished the reservation. A letter from the Secretary of the Interior proposing an addition to the diminished reservation stated: "The proposed addition embraces vacant public-domain lands adjacent to the present Walker River Reservation." S.Rep.No.1750, 74th Cong., 2d Sess. (1936). The statute authorized the Secretary of the Interior "to set aside . . . *agent* . . . of the public-domain . . . as an addition" to the reservation. Act of June 23, 1936, ch. 698, § 1, 49 Stat. 1806–07. The order implementing the statute recited that "the lands . . . are set aside and made a part of the existing Walker River Reservation . . . ." Specifically, a later order restored a portion of the relinquished lands to the reservation in similar language: "[T]he following described lands . . . are hereby *added to* and made a part of the Walker River Reservation . . . ." (Emphasis added.) Finally, a map of the reservation dated 1943 on file with the Branch of Real Property Management, Nevada Indian Agency, indicates the original 1874 executive order boundaries with the legend: "Approximate Location of Old Boundary Line."

Thus we conclude that the 1906 cession had the effect of changing the boundaries of the Walker River Reservation. The ceded lands were restored to the public domain and were no longer "within the limits of" the reservation. These lands were therefore available for right-of-way grants under the 1875 Act.

The only remaining issue is whether the right-of-way through the ceded lands was obtained under the 1875 Act in 1928 when amended maps were approved by the Secretary of the Interior or in 1936 when the cession became effective. This makes no difference, however, with respect to the Tribe's claim for damages. The Tribe had no interest in the ceded lands between 1906 and 1926 and therefore would have no cause of action for trespass over these lands for that period even if the right-of-way were not obtained until 1928. When some of the ceded lands were restored to the reservation in 1936, the right-of-way was not affected. The 1936 statute and order restored the lands subject to any valid existing rights. § 1, 49 Stat. 1807.

[27] The issue does assume importance with respect to the claim of the United

an Indian reservation, but because the lands were reserved "for other purposes in connection with the Indian service," to which the 1899 Act also applies. § 1, 30 Stat. 990 (25 U.S.C. § 312). This result is just on the facts of that case: where the United States holds the lands in trust for the Indians, the Indians should receive the benefit of compensation for a right-of-way granted just as they receive compensation for lands taken by settlers. But here, the Indians have been paid in full for the ceded lands and the lands are neither held in trust for the Indians nor reserved "for other purposes in connection with the Indian service." Therefore, the 1899 Act should not apply. In this situation the lands are "public lands" available for right-of-way grants under the 1875 Act.

38. *DeCoteau* involved one additional circumstance which may not be involved here. The cession agreement was the result of negotiations with the Indians, unlike the cessions that were unilaterally declared by Congress in *Mattz* and *Seymour*. Our case falls somewhere between these two poles. We have not been able to find any legislative history indicating whether the 1902 statute was the result of negotiations with the Indians. The statute appears to declare unilaterally that allotments and $300 cash payments be made, but it also provides that the remaining lands be opened to settlement only after the Indians' consent is obtained. On this issue, this case is thus distinguishable from both *DeCoteau* on the one hand and *Mattz* and *Seymour* on the other. However, in the light of the language and terms of the agreement and the subsequent treatment of the ceded lands, the extent to which the cession may have been unilaterally imposed by Congress does not alter our conclusion that the reservation was diminished.

States since it did have an interest in the ceded lands during the relevant period. Its claim is not barred by any statute of limitations or by the negligence of its officials in asserting its rights. 28 U.S.C. § 2415; *United States v. California*, 332 U.S. 19, 39-40, 67 S.Ct. 1658, 91 L.Ed. 1889 (1947). The issue is easily resolved, however. A right-of-way may be obtained under the 1875 Act by construction of the railroad without any filing of maps. *Jamestown & N. R. R. v. Jones*, *supra*, 177 U.S. at 130-32, 20 S.Ct. 568. Since the railroad here was already constructed when the 1906 cession became effective, a right-of-way was obtained under the 1875 Act at that time.

Therefore, we conclude that the correctness of the district court's conclusion that there was a revocable license is irrelevant as to the ceded lands for the period from 1906 to 1972 because as to that part of the railroad line for that period, Southern Pacific enjoys a right-of-way. The issue must be decided, however, as to the remaining Indian lands and the ceded lands prior to 1906.

VII Revocable License from 1882 to 1972

The district court held that although Southern Pacific does not have a valid easement for a railroad right-of-way through the reservation, it did have an implied license which was not revoked until the Tribe filed its complaint in this action. The effect of this holding is to immunize Southern Pacific from the trespass claims of the Tribe and the United States[36] from 1882 when the railroad was constructed to the time the license was revoked in 1972.

The district court recognized that the 1880 and 1882 agreements were not effective to convey the grantee an easement through the reservation because an easement is an interest in land which can be conveyed by an Indian tribe only "by treaty or convention entered into pursuant to the Constitution." 25 U.S.C. § 177. The district court reasoned, however, that creation of a license is not a conveyance prohibited by section 177. A license was viewed as merely "authority to do a particular act, or series of acts, on another's land, without possessing any estate therein." *Smith v. Royal Insurance Co.*, 111 F.2d 667, 670 (9th Cir.), *cert. denied*, 311 U.S. 676, 61 S.Ct. 43, 85 L.Ed. 435 (1940) (citation omitted). The court then held that the construction of the railroad across the reservation, the failure of the Indians to object to its presence prior to the commencement of this suit, the acceptance by the Indians of money and other consideration pursuant to the agreements and the agreements themselves "clearly establish an implied license in favor of defendants and their predecessors in interest for the use of those lands."

[28] We disagree with the district court and hold that a license may not be inferred from the 1880 and 1882 agreements and attendant circumstances. A license may not be inferred as an implied-in-fact contract because of the failure of Southern Pacific to comply with 25 U.S.C. §§ 81 & 84, which govern contracts with Indian tribes. Thus Southern Pacific argues that it had a consensual,[37] but non-contractual, relationship with the Tribe. It argues that a license may be implied-in-law as a residual privilege resulting from a failure to comply with the formal requirements for creating an easement. *See* Restatement of Property § 514 (1944). But to infer a constructive license would run counter to the historic policies underlying section 177.

Section 177 is the direct descendant of a very early statute which has been a founda-

36. We presume that the reasoning adopted by the district court would bar at least the trespass claim asserted by the United States as trustee for the Indians. To what extent the license also bars the claim of the United States on its own behalf for trespass to lands in which the Indians had no interest (*i. e.*, the lands ceded to the United States in 1906) is not addressed by the district court's opinion. We need not reach this latter issue here, however, since we have held that Southern Pacific has a valid easement through the lands ceded to the United States in 1906.

37. We need not decide whether a consensual relationship existed between Southern Pacific and the Tribe in light of our interpretation of section 177.

tion of federal Indian policy. Henry Knox, the first Secretary of War under the Constitution and the manager of Indian affairs, perceived that a primary cause of Indian wars was disputes related to Indian boundaries. To prevent the steady diminution of Indian territory by individuals acquiring lands privately from the Indians, Congress declared that all dispositions of Indian lands would be invalid unless they were made by public treaty. Act of July 22, 1790, ch. 33, § 4, 1 Stat. 138. *See* S. Tyler, A History of Indian Policy 39-40 (1973). This temporary statute was amplified and then reenacted from time to time, *see* Cohen, Federal Indian Law, *supra*, at 322-23 & n. 392, until the permanent version was enacted in 1834. Act of June 30, 1834, ch. 161, § 12, 4 Stat. 730 (subsequently codified at Rev.Stat. § 2116, now 25 U.S.C. § 177).

The purpose of section 177 is "to prevent unfair, improvident or improper disposition by Indians of lands owned or possessed by them to other parties . . . ." *Federal Power Commission v. Tuscarora Indian Nation*, *supra*, 362 U.S. at 119, 80 S.Ct. at 555. To give effect to an invalid attempt to convey an interest in tribal lands in violation of the statute by holding that it creates a license would undermine this purpose. Purchasers would be encouraged to induce improvident and unfair sales of Indian lands if they could enter into possession and reap profits with immunity from trespass damages so long as no one objects.

Although there are no precedents on the precise issue before us, there are two analogous Supreme Court holdings which we deem controlling. In *Bunch v. Cole*, 263 U.S. 250, 44 S.Ct. 101, 68 L.Ed. 290 (1923), an allottee had leased his land for a term beginning at a too distant time in the future to be permissible under the applicable statute. After the lease expired, the allottee brought suit in an Oklahoma state court against the lessee for wrongful occupancy and use of the land on the theory that the leases were void. The Oklahoma Supreme Court agreed that the leases were void but construed a state statute as requiring creation of tenancy at will at the rental rate specified in the leases.

The Supreme Court reversed, holding that the state statute "gives force and effect to leases which a valid enactment of Congress declares shall be of no force or effect, and that in this respect it must be held invalid . . . ." *Id.* at 254, 44 S.Ct. at 102. The effect of this decision was to give the allottee damages for his tenants' trespass and to deny the tenants the common law defense of consent.

The reasoning of *Bunch v. Cole* is applicable to our case. Federal law provides that the 1880 and 1882 agreements have "[no] validity in law or equity." 25 U.S.C. § 177. The circumstances relied on by the district court in inferring a license are all direct results of these void agreements. The railroad was constructed across the reservation and money and other consideration paid to the Indians pursuant to these agreements. The Indians never objected because of an erroneous belief that the agreements were valid. Giving effect to the conveyances by holding that they give rise to an implied license "gives force and effect to [agreements] which a valid enactment of Congress declares shall be of no force or effect." Therefore, a license may not be inferred from this attempt to convey an easement invalid under section 177.

Smith v. McCullough, 270 U.S. 456, 46 S.Ct. 338, 70 L.Ed. 682 (1926), supports this analysis. A Quapaw Indian allottee leased part of his allotment for mining for 10 years (the maximum term allowed by the applicable statute) with provisos that the term be extended under specified conditions. An assignee of this lease sought a decree in equity declaring that the lease was valid and cancelling a competing lease. The lower court held that the invalid provisions for extending the term were severable and that the lease could be given effect as one for 10 years. Without disputing that the invalid terms might be severable as a matter of common law contract interpretation, the Supreme Court reversed, holding that the severability doctrine could not be applied to give effect to part of an invalid

Indian lease. The Court said that application of the doctrine would undermine the protective purpose of the statute by encouraging lessees to seek long-term leases if the only risk of adverse action was that the term would be limited to 10 years. *Id.* at 390 U.S., 88 S.Ct. 338.

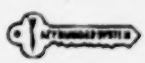
The same analysis applies with even greater force to an attempt to convey an easement invalid under section 177. Under the district court's theory the beneficiary of the invalid conveyance is completely immune from a trespass action, not just for a fixed term as under the theory condemned in *Smith v. McCullough*, but for as long as the invalidity of the conveyance goes unasserted—here for 90 years. We conclude that an implied license is inconsistent with the protective purpose of section 177 and that the district court erred in finding a license in these circumstances.

[29] We do not hold that Indians may never give a license to use their lands. Although we do not decide the issue, there seems to be little doubt that Indians may permit non-Indians to come onto their reservation for some limited purpose such as hunting, fishing or sightseeing and that the Indians' consent is a good defense to a later trespass action. But such permission is clearly not what is involved in this case. No one argues that the parties to the 1880 and 1902 agreement intended that the railroad receive a mere express license, revocable at the will of the Tribe. The 1880 agreement was to grant a right-of-way "forever." This was intended, as the district court recognized, to convey an easement enforceable against the Tribe and the United States independent of their continuing consent. Thus the question whether the Indians could have conveyed an express license if that is what they intended [38] is not before us. We hold only that a license cannot be inferred from the attempted granting of an easement in violation of section 177.

VIII. Conclusion

Although it may appear harsh to condemn an apparently good-faith use as a trespass after 90 years of acquiescence by the owners, we conclude that an even older policy of Indian law compels this result. Southern Pacific does not have and has never had a valid right-of-way across lands within the original 1874 executive order boundaries of the Walker River Reservation except through the lands ceded by the Tribe to the United States in 1906. Southern Pacific has never had a revocable license to operate a railway across the reservation. The case is remanded to the district court for further proceedings consistent with this opinion.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.



38. The only authority cited by the district court for the validity of Indian licenses is Cohen, Federal Indian Law, *supra*, at 332-33. Cohen states, "Where the parties intend to create a bare license to use and enjoy tribal property, there is no statute under which the licensee may be barred from the use of such property . . ." *Id.* at 333. Cohen relies for the most part on some Attorney General opinions, see 18 Op. Atty Gen. 34 (1884); 17 Op. Atty Gen. 134 (1881), but concedes that "the practical absence of litigation in this field leaves us without an authoritative basis for answering many questions which might be put." *Id.*

Cohen also notes that some rights granted to non-Indians may be difficult to characterize; there is a fuzzy line, for example, between licenses, which give third persons exclusive rights to possession and which a tribe may not convey absent permissive statutes, and licenses, which are non-exclusive, non-possessory rights to use the lands of another. *Id.* Here, if the parties had not so clearly intended to convey an easement, we would face such an issue of characterization: should a permit to construct a railroad requiring a large capital investment which might not be recouped for many years of operation be construed as revocable at the will of the Indians? If some period of non-revocability is implied, is the interest then substantial enough that it may not be conveyed under section 177? Since the parties clearly intended an easement and not a license, these issues are not before us.

APPENDIX B

2. Decision of the Assistant Secretary of the Interior for Indian Affairs, dated 19 June 1978.

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

CERTIFIED-RETURN RECEIPT REQUESTED

JUN 19 1978

Echeverria & Osborne, Chartered
555 South Center Street
Reno, Nevada 89501

Mr. Larry W. Telford
One Market Plaza
San Francisco, California 94105

Gentlemen:

This is an appeal by the Southern Pacific Transportation Company, through its attorneys, from a decision of the Assistant Area Director of the Phoenix Area Office affirming the decision of the Superintendent, Western Nevada Agency, to reject for filing, Southern Pacific's application for a railroad right-of-way across tribal lands of the Walker River Reservation. A request was made on behalf of the appellant that the matter be referred to an Administrative Law Judge to conduct an evidentiary hearing. This request has been taken into consideration and rejected. The decision is therefore based on the written briefs of the appellee and the appellant.

A review of the file indicates the following relevant facts. The Southern Pacific Transportation Company (hereinafter "appellant") filed an application on April 28, 1977, for a railroad, telephone and telegraph right-of-way under the Act of March 2, 1899 (25 U.S.C. § 312, et seq.). The application is for a 60-foot width, 10.89 miles in length, across tribally-owned land. On May 4, 1977, the Agency Superintendent returned the application as being incomplete without written evidence of tribal approval. He recommended, at that time, ". . . that negotiations between you and the tribe be finalized before approval action can be considered on your application."

On May 27, 1977, the Acting Superintendent sent appellant a second letter outlining the contents of a properly filed application. In so doing, the Acting Superintendent specified that the application should be submitted under the Act of February 5, 1948 (25 U.S.C. 323), and that, among other things, the application ". . . must have the tribe's concurrence in the form of a tribal resolution." The Superintendent also indicated that the application for telephone and telegraph lines should be submitted separately.

EXHIBIT "A"

On May 27, appellant filed an appeal with the Area Director. On December 12, 1977, the Assistant Area Director, acting on the advice of the Portland Regional Solicitor, affirmed the agency's decision to return the application. The Area Director concentrated on the issue of whether appellant needed to show evidence of tribal consent in presenting its application. In so doing, the Area Director stated that the Secretary has the authority to require appellant to apply under the 1948 Act, but regardless of which act applied, tribal consent is a matter of statutory law and Congressional policy. Therefore, waiver of the consent requirement would constitute an abuse of the Secretary's discretion. The current appeal is from the Area Director's decision.

In its argument, appellant has argued that it is entitled to file its application under the 1899 Act, and that requiring tribal consent is inconsistent with the terms of the 1899 Act. Appellant argues that the 1899 Act provides for an in praesenti grant and that requiring tribal consent cannot therefore be imposed afterwards as a condition of such a grant. Alternatively, the appellant argues that applying the 25 CFR 161.3 consent requirement to applications filed pursuant to the 1899 Act is a denial of due process because the regulations do not make it clear that 161.3 is a pertinent section, applicable to applications under the 1899 Act. Finally, appellant has argued that given the history of the United States' actions toward appellant and its predecessor in interest, the Assistant Secretary should in this case exercise his discretion to waive the consent requirement. Alternatively, because of such behavior, the Assistant Secretary is estopped from applying the consent requirement.

Consent Requirement

We conclude that it is immaterial whether the subject application is filed pursuant to the 1948 or the 1899 Acts, since Congress has made it clear that the consent of tribes organized under the 1934 Indian Reorganization Act is essential before the United States can alienate interests in their trust lands. The Walker River Tribe is an IRA tribe. This requirement flows from 25 U.S.C. § 476, which guarantees IRA tribes the power to prevent the sale, disposition, lease or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe. In other words, the consent requirement is not, in our view, an attribute of the Secretary's power or discretion but is a statutory element of a tribe's sovereign power which the Secretary does not have the discretion to waive.

EXHIBIT "A"

Indeed, the 1948 Right-of-Way Act specifically bars the Secretary's ability to abrogate a tribe's prerogative in such matters. "No grant of a right-of-way over and across any lands belonging to a tribe organized under sections 461-473 and 474-479 of this title; . . . shall be made without the consent of the proper tribal officials." 25 U.S.C. § 324. (See also 1948 U.S. Code Cong. Service, p. 1033.)

That Congress fully understood and intended such a policy is clear from a 1969 report of the House Committee on Government Operations (H. Rep. 91-78, 91st Cong. 1st Sess.), concerning this Department's revised right-of-way regulations which would have allowed the Secretary to waive the consent requirement in the case of non-IRA tribes.

> "We believe the Department's obligation to protect the rights of the Indian tribes should be concluded in regulations which clearly and emphatically preclude any possible misuse of right-of-way grants to alienate Indian land without the consent of the Indians or to evade the maximum terms of years fixed in the acts of Congress authorizing land leasing.
>
> For all of these reasons, it would appear best to retain the present section 161.3 without any change, and to announce unambiguously that your Department intends to observe its own regulations."
>
> (letter to the Secretary of the Interior from Chairman, Natural Resources and Power Subcommittee, February 16, 1968.)

Appellant argues that since 25 U.S.C. § 326 preserves the Secretary's authority under prior right-of-way statutes, the Secretary has continuing authority under the 1899 Act to grant rights-of-way without regard to the consent requirement of § 324. We reject such an interpretation of § 326. The legislative history states that the purpose of the § 326 provision was to ". . . avoid any possible confusion which may arise, particularly in the period of transition from the old system to the new . . . ." That counters the inference that § 326 was intended to maintain separate procedures immune from the consent requirement of the 1948 Act.

EXHIBIT "A"

Also, § 326 must be read together with other sections of the same Act. While § 325 evidences Congress' awareness of continuing authority under other statutes to grant rights-of-way, § 324 categorically and unequivocally states that "no right-of-way" shall be granted without tribal consent. Thus, the language of § 324 embraces rights-of-way granted under § 326. Furthermore, the precise language of § 326 creates an important distinction. It states that the Federal Water Power Act is neither repealed nor amended by the 1948 Act; but, it merely states that prior right-of-way statutes are not repealed. In other words, if imposition of the § 324 consent requirement can be construed as a quasi-amendment of the 1899 Right-of-Way Act, such an amendment is not barred by § 326. We do not think that either the language of § 326, or its legislative history, warrant an abridgment of the application of § 324 to all rights-of-way granted after 1948.

Due Process

We also conclude that, contrary to appellant's assertions, 25 CFR 161.5 and 25 CFR 161.23 make it clear that tribal consent must be obtained before any right-of-way can be granted. Therefore, appellant is not denied procedural due process. 25 CFR 161.23, the section applying to applications filed under the 1899 Act, provides that such applications shall also be subject to ". . . other pertinent sections of this Part 161." Because the consent requirement in 161.3 is so all-inclusive, "(a) No right-of-way shall be granted over and across any tribal land . . .," we do not see any room for question but that such a requirement is pertinent. Also, 161.15, the provision concerning action on applications, states that the grant of a right-of-way shall be evidenced in a conveyancing instrument which incorporates the conditions or restrictions set out in the required consent. Moreover, 161.14 requires that the consideration and damage deposit filed with the applications shall in no event be less than the amount specified in the consent. In other words, the consent requirement is pervasive in the Part 161 application scheme.

Estoppel

Finally, appellant argues that the Assistant Secretary ought to exercise his discretion to waive the consent requirement because of the Department's past approval of the right-of-way. They also argue that the Secretary is estopped from applying it because of such past behavior. As already stated, the Secretary does not have discretion to waive the requirement. Under the 1934 and the 1948 Acts, such an action would, in our view, infringe upon tribal sovereignty.

EXHIBIT "A"

Moreover, estoppel is not applicable to the situation at hand. The case of United States v. Wharton, 514 F.2d 406 (C.A. 9 1975), cited by appellants, concerned title to public lands. The lands involved here are not public but are held in trust for the tribe. Moreover, the Wharton decision placed emphasis on the facts that not applying estoppel would work a fundamental unfairness to the injured party but applying it against the United States would not unduly harm the public interest. Such is not the case here. Requiring the appellant to acquire tribal consent to its right-of-way application will not cause fundamental unfairness, as the divesting of title to land would have in the Wharton case. Moreover, the public interest, namely the tribe's sovereignty and ability to control its lands, would be unduly harmed were the consent requirement dropped in favor of the appellant. The compensation figure is to be negotiated and stated in the tribal consent. The tribe is the direct beneficiary of such compensation. Appellant essentially asks us to shift the burden of past government actions to the tribe's profound disadvantage--the loss of control over their lands and the inability to participate in the determination of how much they should be compensated for such use.

In addition, several cases cited in the Wharton decison indicate that courts are less likely to apply estoppel against the government in matters of legislative significance, as opposed to purely administrative matters (e.g., the interpretations of Department regulations). Shuster v. C.I.R., 312 F.2d 311 (C.A. 9 1962). Appellant asks that estoppel be applied to prevent the federal statutory consent requirement from being applied to them. We do not see that past unauthorized Department approval of a right-of-way is adequate grounds for estopping the application of a current federal requirement. Indeed, if estoppel did not bar the United States from obtaining a federal appellate decision that appellant did not have a valid right-of-way and is a trespasser until such time as it acquires one, we see no basis for applying estoppel to prevent the Department from requiring an applicant to adhere to federal statutory standards in filing an application.

The Area Director's decision also discussed the requirement under the 1899 Act that any deposit tendered upon application to the Secretary must be for the amount determined by the Secretary to be correct. Also, the 1899 Act requires that the application stipulate that permanent terminals be provided. We think that these points can be worked out in conjunction with the agency when appellant submits its needed right-of-way application.

EXHIBIT "A"

It is our conclusion that the Assistant Secretary cannot grant a right-of-way across the lands of a tribe which is subject to the provisions of the Indian Reorganization Act, without written evidence in the application of tribal consent--whether such application be submitted under the 1948 or the 1899 Act.

Accordingly, the decision of the Assistant Area Director dated December 12, 1977, is hereby affirmed. This decision, having been made in the capacity of Assistant Secretary is final for the Department and not subject to the provisions of 25 CFR 2.19(c).

Sincerely,

Forrest J. Gerard

Assistant Secretary--Indian Affairs

EXHIBIT "A"

APPENDIX B

3. Summary Judgment, entered 14 August 1980, by the United States District Court, District of Nevada, to which is appended Order Granting Summary Judgment, entered 25 July 1980.

ENTERED

AUG 14 1980

CLERK U S DISTRICT COURT
DISTRICT OF NEVADA
BY

FILED

AUG 14 1980

CLERK U S DISTRICT COURT

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

SOUTHERN PACIFIC TRANSPORTATION COMPANY,

Plaintiff,

-vs-

CECIL D. ANDRUS, et al.,

Defendants.

and

WALKER RIVER PAIUTE TRIBE OF NEVADA,

Defendant-Intervenor.

CIVIL NO. R-78-0216 BRT

SUMMARY JUDGMENT

Cross Motions for summary judgment have been filed herein by Plaintiff, SOUTHERN PACIFIC TRANSPORTATION COMPANY, and by Defendant, CECIL D. ANDRUS, the Secretary of the Interior (which Motion was joined in by Defendant-Intervenor, the WALKER RIVER PAIUTE TRIBE OF NEVADA).

The Motions have been thoroughly and extensively briefed by the parties and all parties have participated in oral argument.

The Court having carefully considered the arguments and authorities submitted in support of, and in opposition to the Motions, and being fully advised in the matter, has heretofore denied the Motion for summary judgment filed by the Secretary of the Interior and joined in by Intervenor, and has granted the Motion for Summary Judgment filed by Plaintiff. A copy of the ORDER GRANTING SUMMARY JUDGMENT is attached hereto and made

a part hereof by this reference, which Order shall constitute the Findings of Fact and Conclusions of Law herein.

Good cause therefor appearing, IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. CECIL D. ANDRUS, the Secretary of the Interior shall, forthwith, cause to be filed and processed the application and supporting documents heretofore tendered by SOUTHERN PACIFIC TRANSPORTATION COMPANY to the Western Nevada Agency on or about the 28th of April, 1977, with regard to a Railroad right-of-way through Tribal lands within the Walker River Reservation.

2. The filing and processing of said application and the granting of said right-of-way shall be accomplished pursuant to the provisions of the Right-of-Way Statute of 1899 (Act of March 2, 1899 Ch. 374, 25 U.S.C. §§312-318). Said filing, processing and granting shall not be conditioned upon the procurement of the consent of the WALKER RIVER PAIUTE TRIBE of Nevada.

DATED this 13 day of August, 1980.

Bruce R. Thompson
U. S. DISTRICT JUDGE

PRESENTED BY: Nathan M. Jenkins
NATHAN M. JENKINS

ENTERED

JUL 25 1980

FILED

JUL 25 1980

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

SOUTHERN PACIFIC TRANSPORTATION COMPANY,

Civil No. N-78-021 BRT

Plaintiff,

vs.

CECIL D. ANDRUS, et al.,

Defendants,

and

WALKER RIVER PAIUTE TRIBE OF NEVADA,

Defendant-Intervenor.

ORDER GRANTING SUMMARY JUDGMENT

The facts of this case are related in the opinion of the Ninth Circuit Court of Appeals in United States v. Southern Pacific Transportation Company, 543 F.2d 676 (9th Cir. 1976).

Subsequent to that decision, Southern Pacific on April 28, 1977, tendered for filing with the Western Nevada Agency of the Bureau of Indian Affairs, an application for a railroad right-of-way through the Walker River Indian Reservation. The application was proposed in reliance upon the right-of-way statute of 1899. (Act of March 2, 1899 ch. 124, § 1, 30 Stat. 990, 25 U.S.C. 312). A total of 30.47 miles of railroad line had been involved in the earlier action

(supra). The decision of the court sanctioned recognition of a valid right-of-way across 25.72 miles of deeded lands (541 F.2d at 697). The present case pertains to 10.89 miles of railroad line which traverse tribal lands, that is, unallotted lands within the boundaries of the Walker River Indian Reservation.

The Superintendent of the Western Nevada Agency refused to file the application and supporting documents. Two administrative appeals followed and the final agency action on June 19, 1978 affirmed the Superintendent. It was expressly held at all administrative levels that a resolution from the Walker River Tribe consenting to the grant of the requested right-of-way is an essential pre-condition to acceptance of the application for processing.

The Department's position is founded on two statutes postdating the Act of March 2, 1899. The first of these is the Indian Reorganization Act of 1934, and particularly Section 16 of the Act (25 U.S.C. 476), which provides, in part:

> "In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget and the Congress. June 18, 1934, c. 576, § 16, 48 Stat. 987."

Secondly, reliance is placed upon the General Right of Way Act of 1948, and particularly Section 2 (25 U.S.C. 324), which provides, in part:

> "No grant of a right-of-way over and across any lands belonging to a tribe organized under sections 461 477 and 474-479, of this title; section 477a of this title and sections 1580 and 162 of Title 48, and sections 501 509 of this title, shall be made without the consent of the proper tribal officials."

Finally, the clincher is said to be a regulation promulgated by the Secretary pursuant to express grant of regulatory authority (25 U.S.C. 328). The regulation states (25 C.F.R. 161(a), (1978):

> "No right-of-way shall be granted over and across any tribal land, nor shall any permission to survey be issued with respect to any such lands, without the prior written consent of the tribe."

Primary emphasis is placed by the government on the 1948 Act and regulation and it is said, in substance, that pre-consent of tribal authority is required for any grant of any right-of-way across tribal lands because the 1948 Act impliedly repeals the 1899 Act and, in any event, must be read in pari materia with the 1899 Act because both deal with the same subject matter - rights-of-way across tribal lands. In parsing the 1948 Act, however, defendants ignore 25 U.S.C. 326 which says "... nor shall any existing statutory authority empowering the Secretary of the Interior to grant rights-of-way over Indian lands be repealed." Surely, the 1899 Act is such statutory authority. By the same token, the defendants do not allude to 25 U.S.C. section 327 which provides for grant of rights-of-way for the use of the United States under sections 321-328 upon application by a department or agency. Section 324 (supra) is the one that requires tribal consent, and section 328 is the one that authorizes regulations. Yet, I presume that none of us will live to see the day when the statute is construed to require tribal consent as a pre-condition to the acquisition by the United States of an essential easement for governmental pur

poses (the M-X missile system is a possible example). In fact, the legislative history of the 1948 Act (1948 U.S. Code Cong. Service 1816) described 25 U.S.C. section 177 as follows: "Section 5 of the bill broadens existing powers of condemnation over individually owned Indian lands." The entire discussion of the 1948 Indian Rights of Way Act (commencing on page 1831 of the referenced Congressional Service) emphasizes the intent to facilitate the procedures for obtaining rights-of-way. At no place is the purpose of granting to tribal authority a power of absolute veto even mentioned or suggested.

The foregoing leads us into a discussion of the 1899 Act (25 U.S.C. §§ 312-318). The full text is copied in the margin. First, we observe that that section 312 by its very language ("is granted to any railroad company") is a grant in praesenti subject to the performance of conditions precedent and conditions subsequent, as specified in the statutes.* Secondly, we note that the Act expressly applies to a grant of a right-of-way to a railroad which has already been constructed. And, most importantly, under section 312 the participation of the Secretary of Interior in the proceedings is strictly circumscribed. He has no general discretion to deny an application but must merely be satisfied that the application is made in good faith and with intent and ability to construct said road, and must afford parties a right to object and grant them a hearing.

Section 314 of the Act requires payment of just compensation for the right-of-way and provides an administrative procedure (three appraisers) to determine just compensation, and provides for a trial de novo in a United States District Court "and the judgment for damages rendered

* In this respect, section 312 is similar to 43 U.S.C. section 912 (now repealed), which has frequently been interpreted as a grant in praesenti.

by the court shall be final and conclusive." Notably, the Congress did not provide for judicial review of the right of the railroad to obtain a right-of way by compliance with the requirements of the 1899 Act.

The foregoing summary demonstrates, we think, that the 1899 Act in question grants to the railroad the power of eminent domain. The late, great Judge Orie L. Phillips, so held in Clarke v. Boynon, 39 F.2d 800 (10th Cir. 1930). The court said:

> "By the Act of March 2, 1899, Congress granted to railroad companies the power of eminent domain to take rights-of way through Indian lands, upon payment of just compensation therefor. United States v. Ft. Smith & W. R. Co. (C.C.A. 8) 195 F. 211, 212. By this Act, Congress recognized the necessity and the desire for the construction of railroads across Indian lands. When the United States and the Indians decided to throw open for location and settlement the land designated in the Act of March 3, 1905, the desirability of inviting and encouraging construction and operation of needed and convenient lines of railroad, through such lands, was even greater than before, because the construction of such railroads would enhance the value of such lands and make them more readily salable." . . . (Emphasis supplied)

The Eighth Circuit reached the same conclusion in United States v. Ft. Smith & W. R. Co., 195 Fed. 211 (8th Cir. 1912):

> "On March 2, 1899, the day before the passage of the act which has been recited, Congress granted to this and to other railroad companies similarly situated the power of eminent domain to take rights of way through any land held by any Indian in fee and through any Indian reservation in the territory, on condition that it should make compensation therefor to the Nation, to any occupant and to any allottee, for the damage resulting from the taking of the right of way and the construction of the railroad, and it prescribed the same method of fixing the amount of damages in cases of disagreement as is prescribed in the act of March 3, 1899 (chapter 374, 30 Stat. 990, §§ 1, 4)."

The interpretation in Cohen's, Handbook of Federal Indian Law (1958 ed.), page 95, footnote 76 concurs:

"The right of eminent domain may be exercised by the Federal Government over land held by an Indian nation in fee simple under patent from the United States, without the consent of the tribe. Cherokee Nation v. Kansas Ry. Co., 135 U.S. 641 (1890), which rejected the contention that land was held by the Cherokees as a sovereign nation. Some treaties provided that railroads should have rights of-way upon payment of just compensation to the Indian tribes. Treaty of June 5, 1854, with the Miamis, Art. 10, 10 Stat. 1091. See Chapter 15, Sec. 10.

"The Act of March 2, 1899, 30 Stat. 990, authorized any railroad company or telegraph and telephone company to take and condemn a right of-way in or through any lands which have been or may hereafter be allotted in severalty, but have not been conveyed to the allottee with full power of alienation. The Act of February 28, 1902, sec. 21, 32 Stat. 43, discussed in Oklahoma K. & M. I. Ry. Co. v. Bowling, 249 Fed. 592 (C. C. A. 8, 1918), made this statute inapplicable to the Indian Territory and Oklahoma Territory."

The concept of tribal consent as a pre-condition to the grant of a right-of-way is the very antithesis of the exercise of the power of eminent domain. The 1948 Act cannot be construed in pari-materia with the 1899 Act. The subject matters are not even similar. The 1948 Act concerns itself with consensual "grants" of rights-of way freely negotiated at arms length (excepting, as we have seen, section 177 concerning acquisitions by department or agencies of the United States). By contrast, the 1899 Act authorizes the taking and condemnation of rights-of-way for railroads and other uses without consent.

Defendants rely on Plains Elec. Gen. & Tr. Co-op v. Pueblo of Laguna, 542 F.2d 1375 (10th Cir. 1976), which dealt with statutes solely applicable to the Pueblo Indians. We find the rationale of the case to be supportive of our conclusions. The court, there, first held that the Act of May 10, 1926, 44 Stat. 498, was repealed by the Act of April 21, 1928, 45 Stat. 422, 25 U.S.C. 322, and said: "The 1928 Act is so inconsistent with the 1926 Act that it must be held

to repeal the 1926 Act under the principle of Pumpelly v. National City Bank, supra." Neither of those statutes is involved in the present case and we have observed no irreconcilable inconsistency between the 1899 Act and the Indian Reorganization Act and the Indian Rights of Way Act of 1948.

The Pueblo of Laguna case then proceeded to discuss the 1948 Act and holds that it, too, together with the 1899 Act, repeals the 1926 Act because of a "very real antagonism" between the statutes. But it is beyond our understanding that a court can create an implied repeal in the face of direct Congressional declaration "nor shall any existing statutory authority empowering the Secretary of the Interior to grant rights-of-way over Indian lands be repealed." The regulation, 25 C.F.R. 161.3(a), supra, if interpreted to require tribal consent to the exercise of a statutory power of eminent domain is an invalid regulation inasmuch as it is inconsistent with the statutes and beyond the power of the Secretary to promulgate.

Defendants also contend that the Court of Appeals in the earlier case, United States v. Southern Pacific Transportation Co. (supra), precluded plaintiff from relying on the 1899 Act. Not so. The court rejected plaintiff's reliance on the 1899 Act because the railroad had not complied with the requirements of the Act, "including the requirements that maps be filed and approved and that compensation be paid to the Indians." (541 F.2d at 691). We read the court's discussion of the 1899 Act as implicitly recognizing that the Act is a grant in praesenti of a right-of-way (like the 1875 Act) provided that all the statutory conditions are fulfilled. The very purpose of the application for a right of way which is the subject matter of the present action is to comply fully with the conditions of the 1899 Act.

We hold that tribal consent is not a condition

precedent to consideration of plaintiff's application for a right-of-way under the Act of March 2, 1899, and that the Department of Interior should be required to process the application.

Accordingly,

IT HEREBY IS ORDERED:

1. The motion for summary judgment filed by the Secretary of Interior, and joined by intervenor, is denied.

2. The motion for summary judgment filed by plaintiff is granted.

3. Within ten days plaintiff's counsel shall submit an appropriate form of summary judgment.

DATED July 25, 1980.

UNITED STATES DISTRICT JUDGE

Limit of cost

revenue offices, and United States courts, and for other Government uses, in the city of Utica and State of New York, the cost of the site and the building, including fireproof vaults, heating and ventilating apparatus, and approaches, complete, not to exceed the sum of one hundred and eighty-five thousand dollars.

Proposals for sites

Proposals for the sale of land suitable for said site shall be invited by public advertisement in one or more of the newspapers of said city for at least fourteen days prior to the date specified in the advertisement for opening the proposals.

Commissioners to decide on sites

The proposals made in response to said public advertisement, at the time named in the advertisement, or within ten days subsequent thereto, shall be received, opened, and considered by a commission of three persons, who shall be appointed by the Secretary of the Treasury, and it shall be the duty of said commissioners to forward to the Secretary of the Treasury, within forty days of the date named in the advertisement for opening the proposals, a written report, with the original proposals, maps, and so forth, and the oaths prescribed by Act of Congress approved June twenty-third, eighteen hundred and seventy-four, and to definitely state to said report the site selected by them, and their selection of the site shall be final; and each commissioner shall be allowed a compensation for his services of an amount within the discretion of the Secretary of the Treasury, said compensation not to exceed two hundred dollars and actual traveling expenses to each member.

Compensation.

Size of site.

The building shall be unexposed to danger from fire by an open space of at least forty feet on each side, including streets and alleys: *Provided*, That no part of said sum, except ordinary preliminary expenses, shall be expended until a valid title to said site shall be vested in the United States and the State of New York shall cede to the United States exclusive jurisdiction over same, during the time the United States shall be or remain the owner thereof, for all purposes except the administration of the criminal laws of said State and the service of any civil process therein.

Title to site.

Approved, March 3, 1899.

March 3, 1899.

CHAP. 374.—An Act To provide for the acquiring of rights of way by railroad companies through Indian reservations, Indian lands, and Indian allotments, and for other purposes.

General right of way to railroads through Indian lands granted.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a right of way for a railway, telegraph and telephone line through any Indian reservation in any State or Territory, or through any lands held by an Indian tribe or nation in Indian Territory, or through any lands reserved for an Indian agency or for other purposes in connection with the Indian service, or through any lands which have been allotted in severalty to any individual Indian under any law or treaty, but which have not been conveyed to the allottee with full power of alienation, is hereby granted to any railroad company organized under the laws of the United States, or of any State or Territory, which shall comply with the provisions of this Act and such rules and regulations as may be prescribed thereunder: *Provided*, That no right of way shall be granted under this Act until the Secretary of the Interior is satisfied that the company applying has made and executed in good faith and with lawful and ability to construct said road, and in case objection to the granting of such right of way shall be made, said Secretary shall afford the parties so objecting a full opportunity to be heard: *Provided further*, That where a railroad has heretofore been constructed, or is in actual course of construction, no parallel right of way within two miles on either side shall be granted by the Secretary of the Interior unless, in his opinion, public interest will be promoted thereby.

Conditions.

Approval of Secretary of Interior necessary.

Limitation.

Width.

SEC. 2. That such right of way shall not exceed fifty feet in width

on each side of the center line of the road, except where there are heavy cuts and fills, when it shall not exceed one hundred feet in width on each side of the road, and may include ground adjacent thereto for station buildings, depots, machine shops, side tracks, turn outs, and water stations, not to exceed one hundred feet in width by a length of two thousand feet, and not more than one station to be located within any one continuous length of ten miles of road: *Provided*, That this section shall apply to all rights of way heretofore granted to railroads in the Indian Territory where no provisions defining the width of the rights of way are set out in the Act granting the same.

Additional ground for stations, etc.

Proviso. Applies where no provisions in Indian Territory, etc.

SEC. 2. That the line of route of said road may be surveyed and staked through and across any of said lands at any time, upon permission therefor being obtained from the Secretary of the Interior, but before the grant of such right of way shall become effective a map of the survey of the line or route of said road must be filed with and approved by the Secretary of the Interior and the company must make payment to the Secretary of the Interior for the benefit of the Indians or others, of full compensation for such right of way, including all damages to improvements and adjacent lands, which compensation shall be determined and paid under the direction of the Secretary of the Interior in such manner as he may prescribe. Before any such railroad shall be constructed through any land, claim, or improvement, held by restricted occupants or allottees in pursuance of any treaties or laws of the United States, compensation shall be made to such occupant or allottee for all property to be taken, or damages done, by reason of the construction of such railroad. In case of failure to make such settlement with any such occupant or allottee, such compensation shall be determined by the appraisement of three disinterested referees, to be appointed by the Secretary of the Interior, who, before entering upon the duties of their appointment, shall take and subscribe before some person authorized to administer oaths that they will faithfully and impartially discharge the duties of their appointment, which oath, duly certified, shall be returned with their award to the Secretary of the Interior. If the referees can not agree, then any two of them are authorized to make the award. Either party being dissatisfied with the finding of the referees shall have the right within sixty days after the making of the award and notice of the same, to appeal, in cases the land in question is in the Indian Territory, by original petition to the United States court in the Indian Territory sitting at the place nearest and most convenient to the property sought to be condemned, and if said land is situated in any State or Territory other than the Indian Territory, then to the United States district court for such State or Territory, where the case shall be tried de novo and the judgment for damages rendered by the court shall be final and conclusive. Where proceedings are commenced in court as aforesaid, the railroad company shall deposit the amount of the award made by the referees with the court to abide the judgment of the court, and there have the right to enter upon the property sought to be condemned and proceed with the construction of the railway. Each of the referees shall receive for his compensation the sum of four dollars per day while engaged in the hearing of any case submitted to them under this Act. Witnesses shall receive the fees usually allowed by courts within the district where such land is situated. The fee for making compensation of the referees shall be made part of the award or judgment, and be paid by such railroad company.

Maps to be filed.

Damages.

Appraisers.

Appeal.

Fees of referees.

SEC. 3. That if any such company shall fail to construct and put in operation one hundred of its entire line of road, as herein provided, within three years after the approval of the map of the same by the Secretary of the Interior, the right of way hereby granted shall be deemed forfeited and abandoned, and the line of that portion of the road not then constructed and in operation: *Provided*, That the Secretary may, when he deems proper, extend, for a period not exceeding two years, the time for the completion of any road the whole right of way for which is granted and a part of which shall have been built

Forfeiture of rights for non-completion of road.

Annual rental.

SEC. 6. That when a railroad is constructed under the provisions of this Act through the Indian Territory there shall be paid by the railroad company to the Secretary of the Interior, for the benefit of the particular nation or tribe through whose lands the road may be located, such an annual charge as may be prescribed by the Secretary of the Interior, not less than fifteen dollars for each mile of road, the same to be paid so long as said land shall be owned and occupied by such nation or tribe, which payment shall be in addition to the compensation otherwise required herein. And within the Indian Territory upon any railroad constructed under the provisions of this Act the rates and charges for passenger and freight service, if not otherwise prescribed by law, may be prescribed by the Secretary of the Interior from time to time; and the grants herein are made upon condition that the companies shall transport mails, troops, and supplies as required by the Post Office Department.

Passenger and freight rates, Indian Territory.

Railroad rights of way over public lands, Act of 1875 not repealed.

SEC. 9. That the provisions of section two of the Act of March third eighteen hundred and seventy-five, entitled "An Act granting to railroads the right of way through the public lands of the United States," are hereby extended and made applicable to rights of way granted under this Act and to railroad companies obtaining such rights of way.

Regulations.

SEC. 7. That the Secretary of the Interior shall make all needful rules and regulations, not inconsistent herewith, for the proper execution and carrying into effect of all the provisions of this Act.

Amendment.

SEC. 8. That Congress hereby reserves the right at any time to alter, amend, or repeal this Act, or any portion thereof.

Approved, March 3, 1899.

March 3, 1899.

CHAP. 375. An Act to provide for the purchase of a site and the erection of a public building thereon at Clinton, in the State of Iowa.

Clinton, Iowa. Public building to be erected.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury be, and he is hereby, authorized and directed to acquire, by purchase, condemnation, or otherwise, a site, and cause to be erected thereon a suitable building, including fireproof vaults, heating and ventilating apparatus, and approaches, for the use and accommodation of the United States post office and other Government offices, in the city of Clinton and State of Iowa, the cost of said site and building, including said vaults, heating and ventilating apparatus, and approaches, complete, not to exceed the sum of one hundred thousand dollars.

Limit of cost.

Proposals for site.

Proposals for the sale of land suitable for said site shall be invited by public advertisement in one or more of the newspapers of said city of largest circulation for at least thirty days prior to the date specified in said advertisement for the opening of said proposals.

Form of proposals of sites.

Proposals made in response to said advertisement shall be addressed and mailed to the Secretary of the Treasury, who shall then cause the said proposed sites, and such others as he may think proper to designate, to be examined in person by an agent of the Treasury Department, who shall make a written report to said Secretary of the result of said examination, and of his recommendations thereon, and the reasons therefor, which shall be accompanied by the original proposals and all maps, plats, and statements which shall have come into his possession relating to the said proposed sites.

Commission.

If, upon consideration of said report and accompanying papers, the Secretary of the Treasury shall deem further investigations necessary, he may appoint a commission, of not more than three persons, one of whom shall be an officer of the Treasury Department, which commission shall also examine the said proposed sites, and such others as the Secretary of the Treasury may designate, and grant such hearings in relation thereto as they shall deem necessary, and said commission shall, within thirty days after such examination, make to the Secretary of the Treasury written report of their conclusions in the premises

APPENDIX B

4. Amended Summary Judgment, entered 28 August 1980, by the United States District Court, District of Nevada.

RECEIVED
SEP 2 1980

FILED
AUG 28 1980
CLERK, U. S. DISTRICT COURT
By Gibbs Riley

ENTERED
AUG 28 1980
CLERK, U.S. DISTRICT COURT
By Gibbs Riley

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

SOUTHERN PACIFIC TRANSPORTATION COMPANY,

Plaintiff,

vs.

CECIL D. ANDRUS, et al.,

Defendants,

and

WALKER RIVER PAIUTE TRIBE OF NEVADA,

Defendant-Intervenor.

Civil No. R-78-0216 BRT

AMENDED SUMMARY JUDGMENT

On motion of the United States, and good cause appearing,

IT HEREBY IS ORDERED that the Summary Judgment filed August 14, 1980 is hereby amended to provide as follows:

1. Cecil D. Andrus, the Secretary of the Interior, shall forthwith cause to be filed and processed the application and supporting documents heretofore tendered by Southern Pacific Transportation Company to the Western Nevada Agency on or about the 28th of April, 1977, with regard to a railroad right-of-way through tribal lands within the Walker River Reservation.

2. The filing and processing of said application

shall be accomplished pursuant to the provisions of the Right-of-Way Statute of 1899 (Act of March 2, 1899, Ch. 374, 25 U.S.C. §§312-318). Said filing and processing shall not be conditioned upon the procurement of the consent of the Walker River Paiute Tribe of Nevada.

3. This action is remanded to the Secretary of the Interior for further action in accordance with this judgment and accompanying order.

DATED August 27, 1980.

UNITED STATES DISTRICT JUDGE

APPENDIX C

1. Note: A copy of the judgment sought to be reviewed is included at APPENDIX A.1.

APPENDIX C

2. Petition for Rehearing and Suggestion for Rehearing in Banc, filed by Southern Pacific Transportation Company on 14 March 1983 in the United States Court of Appeals for the Ninth Circuit.

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

'83 MAR 14 AM 10 04

FILED _____ _____
DOCKETED ___ _____
DATE INITIAL

SOUTHERN PACIFIC TRANSPORTATION COMPANY,	CA No. 80-4505
Plaintiff-Appellee-Petitioner,	CA No. 80-4506
vs.	D.C. No. Civ 78-0216
JAMES G. WATT, Secretary of the Interior, et al.,	PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC
Defendant-Appellant-Respondent,	
and	
WALKER RIVER PAIUTE TRIBE OF NEVADA,	
Defendant-Intervenor-Appellant-Respondent.)	

To the Clerk of the United States Court of Appeals for the Ninth Circuit:

Southern Pacific Transportation Company hereby petitions for a rehearing concerning the judgment entered in this case on 1 March 1983. As a part of this petition a suggestion of the appropriateness of a rehearing in banc is made pursuant to Rule 35(b), Federal Rules of Appellate Procedure.

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC, SUBMITTED BY SOUTHERN PACIFIC TRANSPORTATION COMPANY

ROBERT J. FOLEY
WILLIAM R. FOLEY
FOLEY, MC INTOSH & FOLEY
PROFESSIONAL CORPORATION
1225 Solano Avenue
Albany, CA 94706
Telephone (415) 524-4123

PETER ECHEVERRIA
NATHAN M. JENKINS
ECHEVERRIA AND OSBORNE,
CHARTERED
555 South Center Street
Reno, NV 89501
Telephone (702) 323-8678

Attorneys for Petitioner, Southern Pacific Transportation Company

TABLE OF CONTENTS

	PAGE
I. INTRODUCTION	1
A. CONSEQUENCE OF DECISION; SUGGESTION FOR REHEARING IN BANC	1
1. Consequence of Decision	1
2. Suggestion for Rehearing in Banc	2
B. BACKGROUND OF THE CASE	3
C. BACKGROUND OF THE STATUTES INVOLVED	4
1. The 1899 Act	4
2. The 1948 Act	5
II. ARGUMENT	5
A. THE COURT'S HOLDING CONTRADICTS ITS PRIOR INTERPRETATION OF THE 1899 ACT	5
B. THE COURT IMPROPERLY APPLIED RULES OF LIBERAL STATUTE INTERPRETATION IN FAVOR OF THE INDIANS	6
1. Legislative History	7
2. Consistency with 1948 Act	7
C. THE COURT IMPROPERLY APPLIES RULES OF ADMINISTRATIVE DEFERENCE	8
D. THE COURT'S INTERPRETATION OF THE 1899 ACT WOULD RENDER THE 1899 ACT UNCONSTITUTIONAL	10
E. THE COURT HAS APPROVED A REDELEGATION BY THE SECRETARY TO THE INDIANS WHICH IS UNCONSTITUTIONAL	11
CONCLUSION	14

APPENDIX

Footnotes (i) - (iii)

TABLE OF AUTHORITIES CITED

Cases

	Page
Adams v. Howerton, 673 F.2d 1036 (9th Cir. 1982)	9
Carter v. Carter Coal Co., 298 U.S. 238 (1935)	12
Central Lincoln People's Utility Dist. v. Johnson, 673 F.2d 1076 (9th Cir. 1982)	9
DeCoteau v. District County Court, 420 U.S. 425 (1975)	7
Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973)	8
Eubank v. Richmond, 226 U.S. 137 (1912)	13
FEC v. Democratic Senatorial Campaign Comm., 454 U.S. 27 (1981)	8
Fisher Flouring Mills Company v. United States, 270 F.2d 27 (9th Cir. 1959)	11
FMC v. Seatrain Lines, Inc., 411 U.S. 693 (1973)	8
FTC v. Colgate-Palmolive, 380 U.S. 374 (1964)	8
General Electric Co. v. Gilbert, 429 U.S. 125 (1976)	9
New York State Dept. of Social Services v. Dublino, 413 U.S. 405 ((1973)	8
NLRB v. Brown, 380 U.S. 278 (1964)	8
Panama Refining Co. v. Ryan, 293 U.S. 388 (1934)	10
Reliance Electric Co. v. Emerson Electric Co., 404 U.S. 418 (1971)	8
Seattle Trust v. Roberge, 278 U.S. 116 (1928)	12, 13
SEC v. Sloan, 436 U.S. 103 (1978)	8
Schechter Corp. v. United States, 295 U.S. 495 (1934)	10
Skidmore v. Swift & Co., 323 U.S. 134 (1944)	8
Soriano v. United States, 494 F.2d 681 (9th Cir. 1974)	8
Teamsters v. Daniel, 439 U.S. 551 (1978)	8
United States v. Matherson, 367 F.Supp 779 (E.D.N.Y. 1973)	12
United States v. Mazurie, 419 U.S. 544 (1974)	14

	Page
United States v. Southern Pacific Transportation Co., 543 F.2d 676 (9th Cir. 1976)	3, 6
United States v. Vuitch, 402 U.S. 62 (1970)	10
Volkswagenwerk v. FMC, 390 U.S. 261 (1968)	8
Watt v. Alaska, 451 U.S. 259 (1980)	9
Zemel v. Rusk, 381 U.S. 1 (1964)	10
Statutes	
25 CFR §161.3	5
5 U.S.C. §706	13
25 U.S.C.:	
§§312-318 (Act of 2 March 1899, ch. 374, 30 Stat. 990) ("1899 Act")	passim
§317	10, 11
§§323-338 (Act of 5 February 1948, ch. 45, 62 Stat. 17) ("1948 Act")	passim
§324	5
§476 (Act of 18 June 1934, ch. 576, 48 Stat. 987) ("IRA")	5
Other Authorities	
Opinion herein	8, 11
S.P. BRIEF	passim
2 U.S. Code Cong. Service 1036 (1948)	5

I

INTRODUCTION

A. CONSEQUENCE OF DECISION; SUGGESTION FOR REHEARING IN BANC

1. Consequence of Decision.

This decision, concerning a Congressional grant of railroad rights-of-way through Indian lands, holds that the Secretary of the Interior is authorized to rewrite the statute by giving to a tribe of Indians an unlimited veto power over the Congressional grant.

In so holding, the court has, in the judgment of counsel, overlooked material fact and law, and failed to address an apparent conflict with another decision of the court, in that it has:

a. Contradicted its own interpretation of the same statute in an earlier appeal concerning the same railroad line;

b. Incorrectly assumed that a statute, passed for the purpose of expanding the interstate railroad network of this nation across Indian land, was passed for the Indians' benefit and must be liberally construed in their favor;

c. Failed to apply accepted criteria in determining the reasonableness of an administrative interpretation, thereby reaching a result inconsistent with statutory mandate;

d. Failed to recognize that the challenged consent regulation was created to preclude abusive granting of rights-of-way by an administrative agency, and has no application to this railroad right-of-way granted by Congress;

e. Interpreted the statute to permit an unconstitutional delegation, by Congress to the Secretary of the Interior, of the power to make (rather than implement) laws;

/ / / / /

f. Approved the consent regulation allowing an unconstitutional delegation, by the Secretary to the Indians, of the Secretary's duty to exercise his discretion under the 1899 Act.

2. Suggestion For Rehearing In Banc.

IT IS SUGGESTED THAT THE REHEARING IN THIS MATTER IS APPROPRIATE FOR HEARING IN BANC

First, this proceeding involves a question of exceptional importance. As is explained below, the railroad's inability to procure the right-of-way granted by Congress by the 1899 Act may lead to the district court on remand granting the Indians' petition for ejectment. Such removal would eliminate the only rail service to central Nevada. Ejectment would terminate vital railroad service to a United States munitions depot at Hawthorne, Nevada. Finally, as indicated in the brief of amicus curiae filed herein, the decision herein may have devastating results because Indian tribes can condition their consent to utility rights-of-way on exorbitant demands. The cost of such utilities to the ultimate consumers will substantially increase; alternatively, utility service may be abandoned.

Secondly, consideration by the full court is necessary to maintain uniformity of its decisions. The present decision holds that the Secretary of the Interior can and has validly required that before he will follow his statutory mandate to consider a railroad's application for a right-of-way, the railroad must first procure the consent of the Indians. That consent, as is discussed below, is conditioned on the willingness of the railroad to pay whatever the Indians demand as a condition of not exercising the veto power given by the Secretary. Yet, in a prior appeal concerning the same railroad line, parties, and statute, this court held that the 1899 Act did not allow for independent negotiations between the railroad and the Indians as to the compensation to be paid for the railroad right-of-way.

Thus the conflict - this decision says the railroad must first have what the prior decision said the railroad could not ask for.

B. BACKGROUND OF THE CASE

This case concerns a railroad line operated by Southern Pacific Transportation Company (S.P.) through the Indian reservation of the Walker River Paiute Tribe of Nevada (Tribe).

The right-of-way has been used continuously by S.P. and its predecessors since 1882, when the railroad line was completed and the Indians were paid for the right-of-way.[1]

The United States and the Indians filed suit against S.P. contending that the century old right-of-way granted by the Indians was invalid. The relief sought included approximately one hundred years of trespass damages and removal of the railroad line.[2] The railroad line is the only rail service to central Nevada. It provides service to a United States munitions depot at Hawthorne, Nevada.[3]

In 1976 this court held that the apparent good-faith use of a railroad line completed and paid for nearly one hundred years ago must be condemned as a trespass, harsh though it may appear.[4]

In that decision, this court rejected S.P.'s argument that it had acquired a right of way under the 1899 Act[5] because the requirements of that Act relative to determining the compensation to be paid for the right-of-way had not been compiled with.[6]

In order to legitimize the right-of-way and to avoid ejectment, an application was submitted in 1977 under authority of the 1899 Act to the Bureau of Indian Affairs. That application was rejected without filing citing 1948 Act regulations requiring tribal consent. That decision was appealed and upheld at all administrative levels.

/ / / / /

S.P. filed suit in 1978 seeking judicial declaration that tribal consent is not, and cannot be, required as a condition precedent to the acceptance and processing of a right-of-way application under the 1899 Act.

Cross motions for summary judgment were filed and argued regarding the validity of the consent requirement. Before decision on the motions, the parties, at the suggestion of the district court, met to determine whether tribal consent could be obtained. S.P. later advised the court that although the parties were not far apart in their opinions of underlying land value, the Tribe's consent would not be forthcoming unless S.P. agreed to pay the Indians, in addition to underlying land value, the value of trackage and railroad improvements installed by S.P. or its predecessors; additionally, the Tribe demanded an amount in excess of seven hundred percent (700%) of land value for the right to acquire an entire transportation corridor.[7]

The district court then ruled, in favor of S.P., that tribal consent is not required as a condition precedent to acquiring a right-of-way under the 1899 Act. The Tribe and the Secretary[8] appealed. This court's reversal of that judgment is the subject of this petition for rehearing.

C. BACKGROUND OF THE STATUTES INVOLVED

1. The 1899 Act.

The 1899 Act was passed at a time in history when the transcontinental railroad network of this country was being constructed. Prior to its passage, a special right-of-way bill was utilized with respect to each railroad line, as it passed over Indian land. The number of such bills, the time of the Secretary of the Interior and the Bureau of Indian Affairs required for their consideration, and the fact that they were not uniform in their substance or procedure necessitated a general statute providing for railroad rights-of-way over Indian land. It was for the purpose of expediting and making uniform these railroad rights-of-way, which promoted the growth and expansion of an

interstate railroad system in an expanding nation that the 1899 Act was passed.[9] By the 1899 Act Congress granted rights-of-way over Indian land to any railroad company complying with the requirements of the Act and with the implementing rules and regulations prescribed by the Secretary. The 1899 Act contains no provision for Indian consent to the right-of-way granted by Congress.

2. The 1948 Act.

The 1948 Act[10] was enacted to simplify and make uniform the provisions by which the Secretary (as opposed to Congress) could grant rights-of-way over Indian land.[11] These rights-of-way could be for any purpose, whereas the 1899 Act was limited to railroad, telegraph and telephone line rights-of-way.

The 1948 Act contains a provision[12] prohibiting the Secretary from granting a right-of-way across lands of a tribe organized under the IRA[13] without the consent of the tribe. This consent requirement was included in the statute in order to prevent the abusive disposition of Indian lands by discretionary administrative actions of the government without tribal consent.[14]

The consent requirement at issue in this case is found in a regulation[15] which S.P. contends was never intended to apply to the Congressional grants under the 1899 Act but only to administrative grants under the 1948 Act.[16]

II

ARGUMENT

A. THE COURT'S HOLDING CONTRADICTS ITS PRIOR INTERPRETATION OF THE 1899 ACT

In 1976, at 543 F.2d 692, this court, in rejecting S.P.'s contention that a right-of-way had been acquired under the 1899 Act, said:

> "As we read the Act and regulations, however, they do not allow for independent negotiations between the railroad and the Indians even if the compensation is later approved by the Secretary of the Interior . . . .

The regulations require that the compensation be determined in the first instance by the United States Indian agent or other designated official, subject to the Interior Secretary's approval." (Emphasis added)

Today the court holds that the Secretary can properly refuse to consider the railroad's application for a right-of-way unless the railroad has procured the consent of the Indians. This court today requires the railroad to procure Indian consent. By its 1976 decision this court held that the 1899 Act did not allow for independent negotiations between the railroad and the Indians.[17]

This conflict disappears if the court holds that the consent regulation is not intended to apply with regard to 1899 Act applications.[18]

B. THE COURT IMPROPERLY APPLIED RULES OF LIBERAL STATUTORY INTERPRETATION IN FAVOR OF INDIANS.

The court construed the 1899 Act "liberally in favor of the Indians" because it believed the 1899 Act to have been passed for the purpose of preserving and protecting Indian interests. This liberal construction is improper; the 1899 Act was not passed for the benefit of Indians. Its clear purpose was to expedite and make uniform the granting, by Congress to railroad companies, of rights-of-way across Indian land. By the 1899 Act Congress itself had made the determination that such rights-of-way should be granted; Congress itself made the grant, subject to the railroads complying with administrative rules which implement the Congressional purpose. If Congress had wanted the grant to be effective only if the Indians consented to it, Congress would have said so.[19]

It is inconceivable that an 1899 Congress would have intended that the interstate railroad network of this nation could cross Indian land only if the Indians consented to it. To reach that conclusion is to completely ignore the facts and circumstances that existed in 1899. That is precisely what the court has done today.

The court's conclusion that the 1899 Act was passed for the benefit of the Indians is based upon two misconceptions:

1. Legislative History.

The court refers to H.R. Rep. No. 1896, 55th Cong., 3d Sess. 2 (1899). What that report said about Indians' interests is:

> "The bill herewith enclosed is thought to be so framed as to fully preserve and protect the rights and interests of the Indians, . . . "

The bill, as written, with no requirement of Indian consent, was sufficient to protect Indian interests because it provided for determination by the Secretary of compensation for the right-of-way.

One cannot read the report cited above and conclude that the bill was passed for the benefit of Indians. The expansion and construction of this nation's railroad network was the obvious purpose.

2. Consistency With 1948 Act.

The court points to the consistency which its interpretation provides between the 1948 Act and the 1899 Act. This is an additional failure of the court to recognize the distinction between administrative and Congressional grants. The consent regulation was adopted under the 1948 Act which provides for administrative grants.[20] The consent requirement protects the Indians from administrative abuse.[21] The consent requirement does not apply to Congressional grants under the 1899 Act. The Indians do not need protection from Congress.

The inescapable conclusion is that the consent regulation, if read to apply in this case, would undermine and frustrate the mandate of Congress and the underlying purpose of the 1899 Act.[22]

/ / / / /

C. THE COURT IMPROPERLY APPLIED RULES OF ADMINISTRATIVE DEFERENCE

The court improperly applied two rules of administrative deference which had the effect of simply rubber stamping the Secretary's construction of the 1899 Act. The court applied these rules:

1. ". . . the construction of a statute rendered by the agency charged with its administration is ordinarily entitled to substantial deference."

2. "Our review is limited to determining whether the Secretary's interpretation is reasonable."23

In the 1899 Act, Congress said:

"A right of way . . . is granted to any railroad company . . . which shall comply with [this Act and the regulations prescribed thereunder]"

Applying the two rules of administrative deference, the court found it reasonable to conclude that Congress meant for the Secretary to take it upon himself to decide that the right-of-way granted by Congress should be withheld if the Indians, for whatever reason, did not want the right-of-way to exist.

In applying these administrative deference rules, the court has ignored the following governing principles:

1. (Although the administrative deference rule ordinarily applies . . .) ". . . the courts are the final authorities on issues of statutory construction [citation omitted] and are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute."24

2. The court must reject administrative constructions of a statute that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement.25

3. The weight to be given to an interpretative regulation depends upon the thoroughness evident in its consideration, the validity of its reasoning, and its consistency with earlier and later pronouncements.26

/ / / / /

Here the court found "reasonable" the Secretary's interpretation that the 1899 Act authorized him to place in the hands of the Indians an unlimited power to veto the right-of-way granted by Congress, although the statute contains neither mandate nor guideline for such a delegation of power.

By adopting that construction the court has failed to reject an administrative construction which is entirely inconsistent with, and frustrates, the statutory mandate and underlying congressional policy embodied in the 1899 Act.

Moreover, it is noteworthy that for the first fifty-two years of its administration of the 1899 Act there was no consent regulation. The consent regulation was adopted in 1951, after enactment of the 1948 Act. The position of S.P. is that this regulation applies solely to the 1948 Act.[27] Wouldn't the Secretary have cited the 1899 Act (as opposed to the 1948 Act) as authority for the adoption of the consent regulation in 1951 if he believed that it applied to the 1899 Act?[28]

The Supreme Court has acknowledged that where the current interpretation of an administrative agency is in conflict with its earlier position, its current interpretation is entitled to "considerably less deference."[29]

We note, finally that in one case relied upon by the court for its "administrative deference" position[30] the court nonetheless found the administrative interpretation unreasonable; and in another[31] the court, while giving lip service to the administrative deference rule, recognized its own duty to ascertain and apply the intent of Congress, and stated that it was basing its decision primarily on the statute itself.[32]

S.P. is entitled to an independent judicial construction of the 1899 Act by this court; such construction must be applied in a manner yielding a result which does not frustrate the clear mandate and purpose of the 1899 Act to grant railroad rights-of-way. That purpose cannot be achieved by an interpretation that the mandate can be defeated by the whim of an Indian tribe.

D. THE COURT'S INTERPRETATION OF THE 1899 ACT WOULD RENDER THE 1899 ACT UNCONSTITUTIONAL.

The court has construed the 1899 Act as authorizing the Secretary to impose conditions upon the congressional grant of rights-of-way contained in the statute. In essence this court reads the statute as saying that the Congress has given a right-of-way, but the Secretary can change that result, if he sees fit.

In reaching this conclusion the court has ignored S.P.'s argument regarding unconstitutional delegation of legislative power[33] and has failed to recognize the constitutional separation between the legislative and executive branches of government.

Congress alone has the legislative power vested by the Constitution. The Secretary of the Interior has none. By the 1899 Act Congress properly authorized the Secretary to implement the law passed by Congress by rules and regulations not inconsistent with the statute.[34] Obviously, in the implementation of the statutory purpose of Congress, the Secretary can impose reasonable conditions to the right-of-way becoming effective, provided the conditions are within the legislative guidelines given by Congress, so that the Secretary is implementing the law made by Congress.

To the contrary, the interpretation of this court is that Congress gave the Secretary the authority to create his own conditions to its grant of the rights-of-way, without any guidelines whatsoever. The court has effectively said that the Secretary has the ability, with no boundaries, to amend the 1899 Act to add any condition he wants to the right-of-way grant.

This delegation, if allowed to stand, is an unconstitutional delegation of the legislative power of Congress to the Secretary.[35]

A statute must be interpreted in a manner rendering it constitutional, rather than unconstitutional.[36] In order to construe the 1899 Act as being

constitutional it cannot be interpreted to authorize the Secretary to make law by establishing grant preconditions which Congress did not see fit to include in the statute. The proper construction, then, is that the 1899 Act does not authorize the Secretary to impose this condition, and the consent regulation is invalid when applied to the 1899 Act.[37]

> "If it were possible for an administrative agency to reinterpret statutory language to fit current policy, a new method of amending Acts passed by Congress has been discovered."[38]

The court states that nothing in the legislative history of the 1899 Act suggests the Secretary's interpretation is unreasonable. It seems sufficient to repeat that the 1899 Act was passed so railroad networks could be completed. It seems clearly unreasonable to hold that Congress, in 1899, intended that its purpose be subject to Indian consent.

For the same reason, we submit the consent requirement is inconsistent with the 1899 Act, and therefore beyond the scope of the Secretary's rule making authority.[39]

E. THE COURT HAS APPROVED A REDELEGATION BY THE SECRETARY TO THE INDIANS WHICH IS UNCONSTITUTIONAL.

The court has validated the Secretary's delegation, to the Indian tribe, of a veto power enabling the tribe to prohibit a railroad right-of-way granted by Congress. The fact that the delegated power was unaccompanied by any rules or guidelines for its exercise was not mentioned by the court. This delegation was deemed proper by the court because:

1. The regulation did not relinquish to the tribe the final authority to approve; it merely delegated a power to disapprove.[40]

Overlooked by the court is the fact that Congress gave railroads rights-of-way subject to compliance with statutory requirements and administrative rules. The Secretary was charged with implementing that statute. By the consent regulation the Secretary has refused to implement the statute unless

the Indians decide that he should do so. Whenever they decide a right-of-way ought not be given, the Secretary will not even consider the matter. The vast power which the Secretary has granted the Indians knows no boundaries for the exercise of their discretion; he has given none. How can it be said that the Secretary has retained the ultimate authority to approve the right-of-way when the Secretary won't consider the exercise of that authority unless the Indians permit?

The case relied upon by the court is not on point.[41] In that case Congress empowed the Secretary to administer the Seashore in a manner consistent with preservation of natural resources. Therefore, the Secretary had the power to decide to issue motor vehicle permits, and to condition the issuance on a prior permit granted by local governmental authority. This he could do because the decision to issue permits was his, not that of Congress.

That case is not this case. Here the Secretary is statutorily charged with seeing to the details of the rights-of-way which Congress has decided to grant to railroads. This court has held that it is permissible for the Secretary to decide that he will not follow his statutory mandate unless the Indians tell him he may.

The procedure established by the Secretary is, we submit, utterly without safeguards or protection against arbitrary exercise of power by the Indians. It denies railroads, the intended beneficiaries of the 1899 Act, rights safeguarded by the due process clause of the Fifth Amendment.[42]

In Seattle Trust v. Roberge, 278 U.S. 116, 122-123 (1928) an ordinance authorized philanthropic homes to be located within a zoning district when the written consent of local owners had been obtained. Plaintiff, without obtaining the consent, applied for a building permit for a proposed philanthropic home. The superintendent, whose statutory duty it was to issue permits when the ordinance was complied with, denied the application solely

for lack of the required consent. Plaintiff sued, contending the ordinance violated due process. The Supreme Court held:

> "The section purports to give the owners . . . authority uncontrolled by any standard or rule prescribed by legislative action - to prevent [plaintiff] from using its land for the proposed home. The superintendent is bound by the decision or inaction of such owners. There is no provision for review under the ordinance; their failure to give consent is final. They are not bound by any official duty, but are free to withhold consent for selfish reasons or arbitrarily and may subject the [plaintiff] to their will or caprice. [citation omitted] The delegation of power so attempted is repugnant to the due process clause of the Fourteenth Amendment.
>
> . . . .
>
> As the attempted delegation of power cannot be sustained, and the restriction thereby sought to be put upon the permission is arbitrary and repugnant to the due process clause, it is the duty of the superintendent to issue, and the [plaintiff] is entitled to have, the permit applied for."43 (emphasis added)

Thus, though the consent regulation merely delegates a power to disapprove, the Secretary will never exercise his discretion if the Indians do not approve, and their ability to disapprove is final, absolute, arbitrary, and subject to no standards or right of review. Placing the exercise of his statutory duty out of his reach unless consented to by the Indians is conduct by the Secretary which requires review and correction by this court under the due process clause of the Constitution and under 5 U.S.C. §706(2)(A), (B), and/or (C).

Contrary to the court's statement, the consent regulation does not represent an effort by the Secretary to incorporate into the decision-making process the wishes of a body with independent authority over the affected land. Rather, the Secretary has decided that unless those wishes are first complied with he need not even consider the matter.

2. Secondly, the court approved the delegated consent to the Indian tribe because the Indians have "independent authority over the subject matter".

/ / / / /

In its reliance on this proposition,[44] the court has overlooked the following controlling principles:

A. The Supreme Court, in Mazurie, expressly reserved decision on the question of whether and to what extent the Fifth Amendment would be available to correct arbitrary or discriminatory tribal exercise of its delegated federal authority;[45]

B. The statute, in Mazurie required that authority delegated to the Indians be exercised pursuant to ordinance approved by the Secretary; here, the Secretary has in no way provided for his own review, at any stage, of the basis upon which the Indians are required or do give or withhold their consent; there is absolutely no attempt to see that such consent is given or withheld in compliance with the purpose of the statute.

C. Indians may have independent authority over rules concerning introduction of liquor into Indian country, a matter of local concern which affects the internal and social relations of tribal life.[46] However, absent a clear expression of Congressional intent, tribes can have no independent authority over the subject of this statute (interstate railroad rights-of-way) or interstate commerce.

D. Congress, by the 1899 Act, determined to extend railroad lines across Indian land and directed the Secretary to see to it. Congress said nothing about Indian consent yet the Secretary determined not to act unless the Indians thought he should. In Mazurie, to the contrary, Congress determined that Indians should make the rules concerning alcoholic beverages in their locality. Justifying the former delegation of power by reference to the latter is not persuasive.

CONCLUSION

In the court's zeal to give a statutory construction favorable to Indians and in deference to an administrative interpretation, it has failed to make a

proper judicial analysis of the statute and has reached a result which is contrary to the clear mandate of the Act, frustrates the purpose of Congress in enacting it, and is violative of constitutional principals of impermissible delegation of powers and due process prohibitions against arbitrariness.

If this decision is not corrected, this railroad line may be ordered removed and/or this and other utilities crossing Indian land may be subjected to uncontrolled Indian demands upon which their consent is conditioned with this type of judicial sanction. Perpetuation of that ability can lead only to termination of an interstate utility service or increased cost to the ultimate consumer.

Respectfully submitted,

FOLEY, MC INTOSH & FOLEY
PROFESSIONAL CORPORATION

By /s/ Robert J. Foley
Robert J. Foley

By /s/ William R. Foley
William R. Foley

ECHEVERRIA AND OSBORNE,
CHARTERED

By Peter Echeverria

By /s/ Nathan M. Jenkins
Nathan M. Jenkins

Attorneys for Petitioner, Southern Pacific Transporation Company

APPENDIX

FOOTNOTES

1 United States v. Southern Pacific Transporation Co., 543 F.2d 676, 680 (9th Cir. 1976)

2 Id. at 680

3 Ibid, footnote 3

4 Id. at 699

5 Act of 2 March 1899, ch. 374, 30 Stat. 990 (codified at 25 U.S.C. §§312-318) (hereinafter referred to as the "1899 Act")

6 543 F.2d at 692-693

7 See STATEMENT OF THE CASE in S.P.'S brief on appeal herein (hereinafter referred to as "S.P. BRIEF") pages 1-3

8 The Secretary of the Interior (herein referred to as "the Secretary")

9 S.P. BRIEF, Part III A

10 Act of 5 February 1948, ch. 45, 62 Stat. 17 (codified at 25 U.S.C. §§323-328) (herein referred to as the "1948 Act")

11 See 2 U.S. Code Cong. Serv. 1036 (1948)

12 25 U.S.C. §324

13 Indian Reorganization Act of 1934 (Act of 18 June 1934, ch. 576, 48 Stat.987)

14 See S.P. BRIEF, Parts II A, II D

15 25 C.F.R. §161.3

16 See S.P. BRIEF, Part III C

17 543 F.2d at 692

18 For a proper construction of the regulations affecting determination of compensation under the 1899 Act, see S.P. BRIEF, Part III B. For authority that the consent regulation was not intended to apply to 1899 Act applications, see S.P. BRIEF, Part III C

19 For legislative history of 1899 Act, see S.P. BRIEF, Part III A

20 See S.P. BRIEF, Part III C

21 See S.P. BRIEF, pages 12, 23

22 Even if the 1899 Act were determined to be passed for the benefit of the Indians, the favorable construction of the statute only applies in the case of ambiguities, and is, after all, only a canon of construction,

which is not a license to disregard clear expressions of congressional intent. Here, that clear expression of Congress is for the effectuation of granted rights of way, not the frustration of that mandate by Indians. See DeCoteau v. District County Court, 420 U.S. 425, 447 (1975)

23 Opinion herein, page 4

24 SEC v. Sloan, 436 U.S. 103, 118 (1978); FTC v. Colgate-Palmolive, 380 U.S. 374, 385 (1964); NLRB v. Brown, 380 U.S. 278, 291 (1964); Volkswagenwerk v. FMC, 390 U.S. 261, 272 (1968) FMC v. Seatrain Lines, Inc., 411 U.S. 693, 745 (1973)

25 FEC V. Democratic Senatorial Campaign Comm., 454 U.S. 27, 32 (1981) Teamsters v. Daniel, 439 U.S. 551, 566 n.20 (1978); See Espinoza v. Farah Mfg. Co., 414 U.S. 86, 94-95 (1973); New York State Dept. of Social Services v. Dubling, 413 U.S. 405, 419-420 (1973); Reliance Electric Co. v. Emerson Electric Co., 404 U.S. 418, 427 (1971)

26 Soriano v. United States, 494 F.2d 681, 683 (9th Cir. 1974); Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)

27 See S.P. BRIEF, Parts III B and III C

28 16 F.R. 8578, 25 August 1951

29 Watt v. Alaska, 451 U.S. 259, 272-273 (1980); General Electric Co. v. Gilbert, 429 U.S. 125, 143 (1976)

30 Central Lincoln People's Utility Dist. v. Johnson, 673 F.2d 1076 (9th Cir. 1982)

31 Adams v. Howerton, 673 F.2d 1036 (9th Cir. 1982)

32 Id. at 1040

33 See S.P. BRIEF, Part II B; although directed to the argument that the IRA gave the Indians a veto power, the argument applies as well to the court's ruling that the 1899 Act gave to the Secretary the authority to rewrite the statute

34 25 U.S.C. §317

35 See Schechter Corp. v. United States, 295 U.S. 495 (1934); Panama Refining Co. v. Ryan, 293 U.S. 388 (1934); and see Black, J., dissenting in Zemel v. Rusk, 381 U.S. 1, 20-21 (1964)

36 United States v. Vulteh, 402 U.S. 62 (1970)

37 The consent regulation may properly be applied where the Secretary is to make the initial determination of whether or not a right-of-way shall be given, as is the case under the 1948 Act

38 See Fisher Flouring Mills Company v. United States, 270 F.2d 27, 32-33 (9th Cir. 1959); see also cases cited at S.P. BRIEF, page 40

39 25 U.S.C. §317

40 Opinion herein, page 13

41 United States v. Matherson, 367 F.Supp. 779 (E.D.N.Y 1973)

42 See Carter v. Carter Coal Co., 298 U.S. 238, 311 (1935)

43 See also Eubank v. Richmond, 226 U.S. 137, 143-144 (1912)

44 Found in U.S. v. Mazurie, 419 U.S. 544 (1974)

45 Id, 558 n. 12

46 Id, 557

PROOF OF SERVICE BY MAIL

I am a citizen of the United States, over the age of eighteen and not a party to the within action; my business address is: 1225 Solano Avenue, Albany, California 94706.

On 14 March 1983 I served the within PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC, in the United States Court of Appeals for the Ninth Circuit, Nos. 80-4505 and 80-4506; on the attorneys in said action, by placing two copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Albany, California, addressed as follows:

Nathan M. Jenkins, Esq.
Echeverria and Osborne,
Chartered
555 South Center Street
Reno, Nevada 89501

Anne Louise Straw
Santa Fe Industries, Inc.
224 South Michigan Avenue
Chicago, Illinois 60604

Anthony C. Liotta
Anne S. Almy
Laura Frossard
United States Department of Justice
Appellate Section
Land & Natural Resource Division
Room 2338
Main Justice Department Building
Washington, D.C. 20530

Yvonne T. Knight
Jeanne S. Whiteing
Native American Rights Fund
1506 Broadway
Boulder, Colorado 80302

I certify (or declare) under penalty of perjury, under the laws of the State of California that the foregoing is true and correct.

Executed on 14 March 1983 at Albany, California.

/s/ Janifer E. Watson

APPENDIX C

3. Order denying rehearing and rejecting suggestion for rehearing in banc, dated 9 June 1983 by the United States Court of Appeals for the Ninth Circuit.

WORK COPY

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JUN 09 1983

PHILLIP B. WINBERRY
CLERK U.S. COURT OF APPEALS

SOUTHERN PACIFIC TRANSPORTATION COMPANY,

Plaintiff-Appellee,

-vs-

JAMES G. WATT, Secretary of the Interior, et al.,

Defendant-Appellant,

and

WALKER RIVER PAIUTE TRIBE OF NEVADA,

Defendant-Intervenor-Appellant.

No. 80-4505
80-4506

D.C. No. Civ 78-0216

O R D E R

BEFORE: FLETCHER, POOLE and CANBY, Circuit Judges

A majority of the panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX C

4. Motion for Stay of Mandate Pending Application for Writ of Certiorari, filed by Southern Pacific Transportation Company on 14 June 1983 in the United States Court of Appeals for the Ninth Circuit.

FOLEY, MC INTOSH & FOLEY
Professional Corporation
P. O. Box 6247
Albany, CA 94706
Telephone (415) 524-4123

Attorneys for Plaintiff/ Appellee,
Southern Pacific Transporation Co.

FILED
14 JUNE 1983

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SOUTHERN PACIFIC TRANSPORTATION COMPANY,

Plaintiff-Appellee,

vs.

JAMES G. WATT, Secretary of the Interior, et al.,

Defendant-Appellant

and

WALKER RIVER PAIUTE TRIBE OF NEVADA,

Defendant-Intervenor-Appellant. /

NOS. 80-4505
80-4506

MOTION FOR STAY OF MANDATE PENDING APPLICATION FOR WRIT OF CERTIORARI

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure ("FRAP"), Southern Pacific Transportation Company ("SP") hereby moves for a stay of the mandate of this Court pending application by SP to the United States Supreme Court for a writ of certiorari.

Judgment was entered herein on 1 March 1983. Pursuant to Rule 41(a) FRAP, the mandate of this Court was stayed by the

/ / / / /

timely filing by SP, on 14 March 1983, of a petition for rehearing (in banc).

The petition for rehearing was denied by this Court, by order entered on 9 June 1983. Unless this motion is granted the mandate of this Court will issue [pursuant to Rule 41(a) FRAP] seven (7) days after entry of said order, namely, on 16 June 1983, before SP will have had an opportunity to apply to the United States Supreme Court for a writ of certiorari.

SP therefore respectfully moves the Court for stay of mandate.

Dated: 14 June 1983

Respectfully submitted,

FOLEY, MC INTOSH & FOLEY
Professional Corporation

By /Robert J. Foley

By William R. Foley

ECHEVERRIA AND OSBORNE,
CHARTERED

By /Peter Echeverria

By /Nathan M. Jenkins

PROOF OF SERVICE BY MAIL

I am a citizen of the United States, over the age of eighteen (18) and not a party to the within action; my business address is 1225 Solano Avenue, Albany, California 94706.

On June 14, 1983 I served a copy of the within MOTION FOR STAY OF MANDATE PENDING APPLICATION FOR WRIT OF CERTIORARI, in the United States Court of Appeals for the Ninth Circuit, Nos. 80-4505 and 80-4506, on the attorneys in said action, by placing two (2) copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Albany, California, addressed as follows:

Nathan M. Jenkins, Esq.
Echeverria and Osborne,
Chartered
555 South Center Street
Reno, Nevada 89501

Anne Louise Kiucke
Santa Fe Industries, Inc.
224 South Michigan Avenue
Chicago, Illinois 60604

Anthony C. Liotta
Anne S. Almy
Laura Frossard
United States Department of Justice
Appellate Section
Land & Natural Resource Division
Room 2338
Main Justice Department Building
Washington, D.C. 20530

Yvonne T. Knight
Jeanne S. Whiteing
Native American Rights Fund
1506 Broadway
Boulder, Colorado 80302

I certify (or declare) under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct.

Executed on June 14, 1983 at Albany, California.

JANET H. E. WATSON

APPENDIX C

5. Order on Motion for Stay of Mandate, dated 27 June 1983, by the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals

FOR THE NINTH CIRCUIT

FILED

JUN 27 1983

PHILLIP B. WINSLOW
CLERK, U.S. COURT OF APPEALS

SOUTHERN PACIFIC TRANSPORTATION COMPANY,

Plaintiff/Appellee,

vs.

JAMES G. WATT, Secretary of the Interior, et al.,

Defendant/Appellant

and

WALKER RIVER PAIUTE TRIBE OF NEVADA,

Defendant/Intervenor-Aplt.

No. 80-4505)
80-4506)
DC CV R-78-0216 BRT

ORDER ON MOTION FOR STAY OF MANDATE
(Rule 41(b) Fed.R.App.P.)

Upon due consideration of plaintiff-appellee motion for stay of the mandate of this Court in the above cause pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari, such petition to be filed in the Clerk's Office of the Supreme Court of the United States on or before July 14, 1983,

IT IS ORDERED that the motion for stay of mandate be, and the same is hereby granted.*

William E. Canby Jr.
United States Circuit Judge
CANBY

*In the event that the motion for stay of mandate and the petition for writ of certiorari are granted, then this stay will continue pending the final disposition of the case by the Supreme Court of the United States.

CA9-003 (12/3/79)

APPENDIX D

1. United States Constitution, Art. I, §8.

Explanatory notes:
Bracketed clause numbers were inserted by the editor.

Sec. 8. [Powers of Congress.]

[1] The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.

[2] To borrow money on the credit of the United States.

[3] To regulate commerce with foreign nations, and among the several States, and with the Indian tribes.

[4] To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States.

[5] To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures.

[6] To provide for the Punishment of counterfeiting the Securities and current Coin of the United States.

[7] To establish Post Offices and post Roads.

[8] To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

[9] To constitute tribunals inferior to the Supreme Court.

[10] To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.

[11] To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water.

[12] To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years.

[13] To provide and maintain a Navy.

[14] To make Rules for the Government and Regulation of the land and naval Forces.

[15] To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.

[16] To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.

[17] To exercise exclusive Legislation in all Cases whatsoever, over such

District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, Dock-Yards, and other needful Buildings. And,

[18] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Explanatory notes:
Bracketed clause numbers were inserted by the editor.

Sec. 9. [Powers denied Congress.]

[1] The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

[2] The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

[3] No Bill of Attainder or ex post facto Law shall be passed.

[4] No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

[5] No Tax or Duty shall be laid on Articles exported from any State.

[6] No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

[7] No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

[8] No Title of Nobility shall be granted by the United States: and no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

Explanatory notes:
Bracketed clause numbers were inserted by the editor.

APPENDIX D

2. United States Constitution, Fifth Amendment.

CONSTITUTION

of the

UNITED STATES OF AMERICA

AMENDMENT 5

Criminal actions—Provisions concerning—Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

CROSS REFERENCES

Constitutional right to be informed of nature and cause of accusation, generally, Constitution, Amendment 6.

Prohibition against state's denial of due process or equal protection, Constitution, Amendment 14.

Grand jury procedure, generally, Rule 6 of Federal Rules of Criminal Procedure.

Procedure as to indictment and information, generally, Rule 7 of Federal Rules of Criminal Procedure.

RESEARCH GUIDE

Am Jur:

16 Am Jur 2d, Constitutional Law §§ 332-334, 361-381, 542-584

21 Am Jur 2d, Criminal Law §§ 165-216, 220-228, 349-368

26 Am Jur 2d, Eminent Domain §§ 1 et seq.

38 Am Jur 2d, Grand Jury § 3

77 Am Jur 2d, United States §§ 35, 92, 93, 114

Annotations:

Supreme Court's views as to the federal legal aspects of the right of privacy. 41 L Ed 2d 871.

APPENDIX D

3. 5 U.S.C. §706.

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title [5 USCS §§ 556 and 557] or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(Sept. 6, 1966, P. L. 89-554, § 1, 80 Stat. 393.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prior law and revision:

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
	5 USC § 1009(e)	June 11, 1946, ch 324, § 10(e), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title (5 USCS §§ 101 et seq.).

Other provisions:

Abbreviation of record. Act Aug. 28, 1958, P. L. 85-791, § 35, 72 Stat. 941, which authorized the abbreviation of the record on the review or enforcement of orders of administrative agencies and review on the original papers, provided that: "This Act [for full classification of this Act, consult USCS Tables volumes] shall not be construed to repeal or modify any provision of the Administrative Procedure Act [5 USCS §§ 551 et seq.]."

CROSS REFERENCES

Power to prescribe departmental regulations, 5 USCS § 301.

Rules, opinions, orders, records, and proceedings to be made public, 5 USCS § 552.

APPENDIX D

4. Act of 2 March 1899, ch. 374, 30 Stat. 990 (25 U.S.C. §§312-318) ("1899 Act").

Courts of the state of Arizona do not have jurisdiction over offenses in violation of the state traffic code committed by an Indian upon state highways running through an Indian reservation. Re Application of Denetclaw (1958) 83 Ariz 299, 320 P2d 697.

That crime was committed on highway constructed through Indian reservation did not oust state courts jurisdiction on state court. State v Monroe (1929) 83 Mont 556, 274 P 840.

Where the United States had granted to state a right of way and permission for construction of public highway through Menominee Indian Reservation, the state could require a tribal Indian living on such to register his motor truck and pay a registration fee for its operation over that portion of the highway within the exterior boundaries of the reservation. State v Tinker (1941) 237 Wis 110, 294 NW 845.

§ 312. Rights-of-way for railway, telegraph, and telephone lines; town-site stations

A right of way for a railway, telegraph and telephone line through any Indian reservation in any State or Territory, or through any lands held by an Indian tribe or nation in Indian Territory, or through any lands reserved for an Indian agency or for other purposes in connection with the Indian service, or through any lands which have been allotted in severalty to any individual Indian under any law or treaty, but which have not been conveyed to the allottee with full power of alienation, is hereby granted to any railroad company organized under the laws of the United States, or of any State or Territory, which shall comply with the provisions of this Act and such rules and regulations as may be prescribed thereunder: Provided, That no right of way shall be granted under this Act until the Secretary of the Interior is satisfied that the company applying has made said application in good faith and with intent and ability to construct said road, and in case objection to the granting of such right of way shall be made, said Secretary shall afford the parties so objecting a full opportunity to be heard: Provided further, That where a railroad has heretofore been constructed, or is in actual course of construction, no parallel right of way within ten miles on either side shall be granted by the Secretary of the Interior unless, in his opinion, public interest will be promoted thereby: Provided also, That as a condition precedent to each and every grant of a right of way under authority of this Act each and every railway company applying for such grant shall stipulate that it will construct and permanently maintain suitable passenger and freight stations for the convenience of each and every town site established by the Government along said right of way.

(Mar. 2, 1899, ch 374, § 1, 30 Stat. 990; June 25, 1910, ch 431, § 16, 36 Stat. 859.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

"This Act", referred to in this section, is Act Mar. 2, 1899, ch 374, 30 Stat. 990, which appears generally as 25 USCS §§ 312 et seq. For full classification of this Act, consult USCS Tables volumes.

§ 313. Width of right-of-way

Such right of way shall not exceed fifty feet in width on each side of the center line of the road, except where there are heavy cuts and fills, when it shall not exceed one hundred feet in width on each side of the road, and may include grounds adjacent thereto for station buildings, depots, machine shops, sidetracks, turn-outs, and water stations, not to exceed two hundred feet in width by a length of three thousand feet, and not more than one station to be located within any one continuous length of ten miles of road.

(Mar. 2, 1899, ch 374, § 2, 30 Stat. 990; June 21, 1906, ch 3504, 34 Stat. 330.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Amendments:

1906. Act June 21, 1906, substituted "two hundred feet" for "one hundred feet," and "three thousand feet" for "two thousand feet."

Other provisions:

Partial repeal. Act Sept. 28, 1982, ch 134, § 23, 32 Stat. 50, repealed 25 USCS §§ 312 et seq. insofar as they applied to the Indian Territory and Oklahoma Territory.

CROSS REFERENCES

Application to Pueblo Indians of New Mexico, 25 USCS § 322.
This section is referred to in 25 USCS §§ 312, 314, 316, 317, 318, 322.

§ 314. Survey; maps; compensation

The line of route of said road may be surveyed and located through and across any of said lands at any time, upon permission therefor being obtained from the Secretary of the Interior; but before the grant of such right of way shall become effective a map of the survey of the line or route of said road must be filed with and approved by the Secretary of the Interior, and the company must make payment to the Secretary of the Interior for the benefit of the tribe or nation, of full compensation for such right of way, including all damage to improvements and adjacent lands, which compensation shall be determined and paid under the direction of the Secretary of the Interior, in such manner as he may prescribe. Before any such railroad shall be constructed through any land, claim, or improvement, held by individual occupants or allottees in pursuance of any treaties or laws of the United States, compensation shall be made to such occupant or allottee for all property to be taken, or damage done, by reason of the construction of such railroad. In case of failure to make amicable settlement with any such occupant or allottee, such compensation shall be determined by the appraisement of three disinterested referees, to be appointed by the Secretary of the Interior, who, before entering upon the duties of their appointment, shall take and subscribe before competent

authority an oath that they will faithfully and impartially discharge the duties of their appointment, which oath, duly certified, shall be returned with their award to the Secretary of the Interior. If the referees can not agree, then any two of them are authorized to make the award. Either party being dissatisfied with the finding of the referees shall have the right within sixty days after the making of the award and notice of the same, to appeal, in case the land in question is in the Indian Territory, by original petition to the United States court in the Indian Territory sitting at the place nearest and most convenient to the property sought to be condemned, and if said land is situated in any State or Territory other than the Indian Territory, then to the United States district court for such State or Territory, where the case shall be tried de novo and the judgment for damages rendered by the court shall be final and conclusive. When proceedings are commenced in court as aforesaid, the railroad company shall deposit the amount of the award made by the referees with the court to abide the judgment thereof, and then have the right to enter upon the property sought to be condemned and proceed with the construction of the railway. Each of the referees shall receive for his compensation the sum of four dollars per day while engaged in the hearing of any case submitted to them under this Act. Witnesses shall receive the fees usually allowed by courts within the district where such land is located. Costs, including compensation of the referees, shall be made part of the award or judgment, and be paid by such railroad company.

(Mar. 2, 1899, ch 374, § 3, 30 Stat. 991.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

"This Act", referred to in this section, is Act Mar. 2, 1899, ch 374, 30 Stat. 990, which appears generally as 25 USCS §§ 312 et seq. For full classification of this Act, consult USCS Tables volumes.

Other provisions:

Partial repeal. Act Feb. 28, 1902, ch 134, § 23, 32 Stat. 50, repealed 25 USCS §§ 312 et seq. insofar as they applied to the Indian Territory and Oklahoma Territory.

CROSS REFERENCES

Application to Pueblo Indians of New Mexico, 25 USCS § 322.
This section is referred to in 25 USCS §§ 312, 316, 317, 318, 322.

INTERPRETIVE NOTES AND DECISIONS

Where Indian allottee conveys his interest in the land to another after condemnation, the conveyance does not transfer the right to compensation unless expressly so provided, and such compensation is payable to the one who was allottee at time of the condemnation. Smith v Northern P. R. Co. (1919) 57 Mont. 14, 186 P. 644.

Cancellation of homestead entry after condemnation proceedings did not cause reversionary interest of homesteader to vest in railroad. Lind & A. R. Co. v Kephart (1906) 19 Okla. 1, 91 P. 1069.

Where railroad company acquires land for right-of-way by condemnation, grant also passes

way, and builds its main line, side tracks, and stations, the company will not be ousted on an action by one claiming an after-acquired title. Goldsberry v. Sampson (1924) 101 Okla 232, 229 P 1054.

§ 315. Time for completion of road; forfeiture

If any such company shall fail to construct and put in operation one-tenth of its entire line in one year, or to complete its road within three years after the approval of its map of location by the Secretary of the Interior, the right of way hereby granted shall be deemed forfeited and abandoned ipso facto as to that portion of the road not then constructed and in operation: Provided, That the Secretary may, when he deems proper, extend, for a period not exceeding two years, the time for the completion of any road for which right of way has been granted and a part of which shall have been built.

(Mar. 2, 1899, ch 374, § 4, 30 Stat. 991.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Other provisions:

Partial repeal. Act Feb. 28, 1902, ch 134, § 23, 32 Stat. 50, repealed 25 USCS §§ 312 et seq. insofar as they applied to the Indian Territory and Oklahoma Territory.

CROSS REFERENCES

Application to Pueblo Indians of New Mexico, 25 USCS § 322.
This section is referred to in 25 USCS §§ 312, 314, 316, 317, 318, 322.

§ 316. Rights of several roads through canyons

The provisions of section two of the Act of March third, eighteen hundred and seventy-five, entitled "An Act granting to railroads the right of way through the public lands of the United States", are hereby extended and made applicable to rights of way granted under this Act and to railroad companies obtaining such rights of way.

(Mar. 2, 1899, ch 374, § 6, 30 Stat. 992.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

"Section two of the Act of March third, eighteen hundred and seventy-five, entitled 'An Act granting to railroads the right of way through the public lands of the United States'", referred to in this section, is Act Mar. 3, 1875, ch 152, § 2, 18 Stat. 482, which formerly appeared as 43 USCS § 935 and which was repealed by Act Oct. 21, 1976, P. L. 94-579, Title VII, § 706(a), 90 Stat. 2793, effective on and after Oct. 21, 1976, as provided by § 706(a) of such Act, insofar as applicable to the issuance of right-of-way over, under, and through the public lands and lands in the National Forest System.

"This Act", referred to in this section, is Act Mar. 2, 1899, ch 374, 30 Stat. 990, which appears generally as 25 USCS §§ 312 et seq. For full classification of this Act, consult USCS Tables volumes.

Other provisions:

Partial repeal. Act Feb. 28, 1902, ch 114, § 23, 32 Stat. 50, repealed 25 USCS §§ 312 et seq. insofar as they applied to the Indian Territory and Oklahoma Territory.

CROSS REFERENCES

This section is referred to in 25 USCS §§ 312, 314, 317, 318.

RESEARCH GUIDE

Law Review Articles:

Acquisition of Access Rights and Rights of Way on Fee, Public Domain, and Indian Lands. 10 Rocky Mt MI. law 217.

§ 317. Regulations

The Secretary of the Interior shall make all needful rules and regulations, not inconsistent herewith, for the proper execution and carrying into effect of all the provisions of this Act.

(Mar. 2, 1899, ch 374, § 7, 30 Stat. 992.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

"Herewith", referred to in this section, is probably intended to be a reference to Act Mar. 2, 1899, ch 374, 30 Stat. 992, which appears as 25 USCS §§ 312 et seq.

"This Act", referred to in this section, is Act Mar. 2, 1899, ch 374, 30 Stat. 990, which appears generally as 25 USCS §§ 312 et seq. For full classification of this Act, consult USCS Tables volumes.

Other provisions:

Partial repeal. Act Feb. 28, 1902, ch 114, § 23, 32 Stat. 50, repealed 25 USCS §§ 312 et seq. insofar as they applied to the Indian Territory and Oklahoma Territory.

CROSS REFERENCES

Application to Pueblo Indians of New Mexico, 25 USCS § 322.
This section is referred to in 25 USCS §§ 312, 314, 316, 318, 322.

§ 318. Amendment or repeal of sections

Congress hereby reserves the right at any time to alter, amend, or repeal this Act, or any portion thereof.

(Mar. 2, 1899, ch 374, § 8, 30 Stat. 992.)

APPENDIX D

5. Act of 5 February 1948, ch. 45, 62 Stat. 17 (25 U.S.C. §§323-328) ("1948 Act").

RESEARCH GUIDE

Law Review Articles:

Acquisition of Access Rights and Rights of Way on Fee, Public Domain, and Indian Lands. 10 Rocky Mt MLI Inst 217.

§ 322a. Renewal of rights-of-way without consent of Pueblo Tribes; authority of Secretary; compensation, etc.

Notwithstanding such provisions, the Secretary of the Interior may, without the consent of the affected Pueblo Tribes, grant one renewal for a period not to exceed ten years of any right-of-way acquired through litigation initiated under the Act of May 10, 1926 (44 Stat. 498) [unclassified], or by compromise and settlement in such litigation, prior to January 1, 1975. The Secretary shall require, as compensation for the Pueblo involved, the fair market value, as determined by the Secretary, of the grant of such renewal. The Secretary may grant such right-of-way renewal under this section only in the event the owner of such existing right-of-way and the Pueblo Tribe involved cannot reach agreement on renewal within ninety days after such renewal is requested. Nothing in this section shall be deemed to validate or authorize the renewal of a right-of-way which is otherwise invalid by reason of the invalidity of the Act of May 10, 1926 [unclassified], on the date said right-of-way was originally obtained.
(Sept. 17, 1976, P. L. 94-416, § 2, 90 Stat. 1275.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

"Notwithstanding such provisions", referred to in this section, is probably intended to be a reference to the provisions of 25 USCS § 322.

Transfer of functions:

Enforcement functions of Secretary or other official in Department of Interior relating to compliance with rights-of-way across Indian lands, issued under 25 USCS §§ 321 et seq. with respect to pre-construction, construction, and initial operation of transportation system for Canadian and Alaskan natural gas were transferred to the Federal Inspector, Office of Federal Inspector for the Alaska Natural Gas Transportation System, until the first anniversary of the date of initial operation of the Alaska Natural Gas Transportation System, see Reorg. Plan No. 4 of 1979, §§ 102(e), 203(a), 44 Fed. Reg. 33663, 33666, 93 Stat. 1373, 1376, which appear as 5 USCS § 903 note, effective July 1, 1979, pursuant to Ex. Or. No. 12142 of June 21, 1979, § 1-101, 44 Fed. Reg. 36927, which appears as 15 USCS § 719e note.

§ 323. Rights-of-way for all purposes across any Indian lands

The Secretary of the Interior be, and he is hereby, empowered to grant rights-of-way for all purposes, subject to such conditions as he may prescribe, over and across any lands now or hereafter held in trust by the United States for individual Indians or Indian tribes, communities, bands,

or nations, or any lands now or hereafter owned, subject to restrictions against alienation, by individual Indians or Indian tribes, communities, bands, or nations, including the lands belonging to the Pueblo Indians in New Mexico, and any other lands heretofore or hereafter acquired, or set aside for the use and benefit of the Indians.

(Feb. 5, 1948, ch 45, § 1, 62 Stat. 17.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Effective date of section:

For the effective date of this section, see Act Feb. 5, 1948, ch 45, § 7, 62 Stat. 18, which appears as an Other provisions note to this section.

Transfer of functions:

Enforcement functions of Secretary or other official in Department of Interior relating to compliance with rights-of-way across Indian lands, issued under 25 USCS §§ 321 et seq. with respect to pre-construction, construction, and initial operation of transportation system for Canadian and Alaskan natural gas were transferred to the Federal Inspector, Office of Federal Inspector for the Alaska Natural Gas Transportation System, until the first anniversary of the date of initial operation of the Alaska Natural Gas Transportation System, see Reorg. Plan No. 1 of 1979, §§ 102(e), 203(a), 44 Fed. Reg. 33663, 33666, 93 Stat. 1373, 1376, which appear as 5 USCS § 903 note, effective July 1, 1979, pursuant to Ex. Or. No. 12142, § 1-101, June 21, 1979, 44 Fed. Reg. 36927, which appear as 15 USCS § 719e note.

Other provisions:

Effective date and application of Act Feb. 5, 1948. Act Feb. 5, 1948, ch 45, § 7, 62 Stat. 18, provided: "This Act [25 USCS §§ 323 et seq.] shall not become operative until thirty days after its approval [enacted Feb. 5, 1948]."

CODE OF FEDERAL REGULATIONS

Rights-of-way over Indian lands, 25 CFR Part 169.

CROSS REFERENCES

This section is referred to in 25 USCS §§ 322, 326, 327, 328, 1724; 43 USCS § 421c.

RESEARCH GUIDE

Federal Procedure L Ed:

Fed Proc, L Ed § 14:228.

Am Jur:

61 Am Jur 2d, Pipelines § 25.

INTERPRETIVE NOTES AND DECISIONS

There is no requirement that 25 USCS § 321 be used to the exclusion of 25 USCS § 357 and there is not any requirement that the permission provided for under § 323 be secured before condemnation proceedings under § 357. Nezhukumatathil v. Washington Water Power Co. (1959, CA9 Idaho) 264 F 2d 614.

Timber sales statutes (25 USCS § 406-407), statute providing for regulations and assessment yield (25 USCS § 466), and statutes providing for rights of way (25 USCS § 318a, 323-325) giving federal officials full authority to manage Indian forest property and land, create fiduciary relationship, and Indians can recover for breach of fiduciary obligations, but recovery will not necessarily be equivalent to that imposed on private trustee managing beneficiary's property. Mitchell v. United States (1981, Ct Cl) 664 F2d 705, cert gr (US) 71 L Ed 2d 1312, 102 S Ct 2901.

Whenever it appears that the Secretary of the Interior has abused the discretion reposed in him by 25 USCS § 323, federal district court has jurisdiction under 25 USCS § 345 to adjudicate the resulting controversy between the Secretary and the allottees, and decree to the extent then necessary the precise location, nature, and extent of any rights-of-way appropriate to the use of the allotted land. Segundo v. United States (1954, DC Cal) 121 F Supp 554, app dismd (CA9 Cal) 221 F 2d 296 and affd in part and revd in part on other grounds (CA9 Cal) 235 F 2d 885.

In light of more recent Indian Right-of-Way Act of 1948 (25 USCS §§ 323 to 328), 25 USCS § 357 may not be employed by state public utility district to condemn right-of-way for proposed electric transmission line over and across trustlands, including tracts of trustland which have been allotted to individual Indians, since such right-of-way can only be acquired by grant of permission from Secretary as provided by 25 USCS §§ 323 to 328. Nebraska Public Power Dist. v 100.95 Acres of Land (1982, DC Neb) 540 F Supp 592.

§ 324. Consent of certain tribes; consent of individual Indians

No grant of a right-of-way over and across any lands belonging to a tribe organized under the Act of June 18, 1934 (48 Stat. 984), as amended; the Act of May 1, 1936 (49 Stat. 1250); or the Act of June 26, 1936 (49 Stat. 1967) [25 USCS §§ 501 et seq.], shall be made without the consent of the proper tribal officials. Rights-of-way over and across lands of individual Indians may be granted without the consent of the individual Indian owners if (1) the land is owned by more than one person, and the owners of owner of a majority of the interests therein consent to the grant; (2) the whereabouts of the owner of the land or an interest therein are unknown, and the owners or owner of any interests therein whose whereabouts are known, or a majority thereof, consent to the grant; (3) the heirs or devisees of a deceased owner of the land or an interest therein have not been determined, and the Secretary of the Interior finds that the grant will cause no substantial injury to the land or any owner thereof; or (4) the owners of interests in the land are so numerous that the Secretary finds it would be impracticable to obtain their consent, and also finds that the grant will cause no substantial injury to the land or any owner thereof.
(Feb. 5, 1948, ch 45, § 2, 62 Stat. 18.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:

"The Act of June 18, 1934 (48 Stat. 984)", referred to in this section, is Act June 18, 1934, ch 576, 48 Stat. 984, which appears generally as 25 USCS §§ 461 et seq. For full classification of such Act, consult USCS Tables volumes.

§ 325. Payment and disposition of compensation

No grant of a right-of-way shall be made without the payment of such compensation as the Secretary of the Interior shall determine to be just. The compensation received on behalf of the Indian owners shall be disposed of under rules and regulations to be prescribed by the Secretary of the Interior.

(Feb. 5, 1948, ch 45, § 3, 62 Stat. 18.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Effective date of section:

For the effective date of this section, see Act Feb. 5, 1948, ch 45, § 7, 62 Stat. 18, which appears as 25 USCS § 323 note.

Transfer of functions:

Enforcement functions of Secretary or other official in Department of Interior relating to compliance with rights-of-way across Indian lands, issued under 25 USCS §§ 321 et seq. with respect to pre-construction, construction, and initial operation of transportation system for Canadian and Alaskan natural gas were transferred to the Federal Inspector, Office of Federal Inspector for the Alaska Natural Gas Transportation System, until the first anniversary of the date of initial operation of the Alaska Natural Gas Transportation System, see Reorg. Plan No. 1 of 1979, §§ 102(e), 203(a), 44 Fed. Reg. 33663, 33666, 93 Stat. 1373, 1376, which appear as 5 USCS § 903 note, effective July 1, 1979, pursuant to Ex. Or. No. 12142, § 1-101, June 21, 1979, 44 Fed. Reg. 36927, which appear as 15 USCS § 719e note.

Other provisions:

Application of section. For the application of this section, see Act Feb. 5, 1948, ch 45, § 7, 62 Stat. 18, which appears as 25 USCS § 323 note.

CODE OF FEDERAL REGULATIONS

Rights-of-way over Indian lands, 25 CFR Part 169.

CROSS REFERENCES

This section is referred to in 25 USCS §§ 322, 326, 327, 328, 1724; 43 USCS § 421c.

RESEARCH GUIDE

Am Jur:

61 Am Jur 2d, Pipelines § 25.

INTERPRETIVE NOTES AND DECISIONS

Provisions of 25 USCS §§ 323-325, protecting Indian allotments against improvident grants of rights-of-way, give rise to rights appurtenant to allotted lands, for preservation of which actions may be brought in federal court under 25 USCS § 345 and 28 USCS § 1331. Loring v. United States (1979, CA9 Ariz) 610 F2d 649.

§ 326. Laws unaffected

This Act [25 USCS §§ 323 et seq.] shall not in any manner amend or repeal the provisions of the Federal Water Power Act of June 10, 1920 (41 Stat. 1063), as amended by the Act of August 26, 1935 (49 Stat. 838), nor shall any existing statutory authority empowering the Secretary of the Interior to grant rights-of-way over Indian lands be repealed hereby.
(Feb. 5, 1948, ch 45, § 4, 62 Stat. 18.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

References in text:
"The Federal Water Power Act of June 10, 1920 (41 Stat. 1063), as amended by the Act of August 26, 1935 (49 Stat. 838)", referred to in this section, is Act June 10, 1920, ch 285, 41 Stat. 1063, as amended by Act Aug. 26, 1935, ch 687, 49 Stat. 838, now known as the Federal Power Act, which generally appears as 16 USCS §§ 791a et seq. For full classification of this Act, consult USCS Tables volume.

Effective date of section:
For the effective date of this section, see Act Feb. 5, 1948, ch 45, § 7, 62 Stat. 18, which appears as 25 USCS § 323 note.

Transfer of functions:
Enforcement functions of Secretary or other official in Department of Interior relating to compliance with rights-of-way across Indian lands, issued under 25 USCS §§ 321 et seq. with respect to pre-construction, construction, and initial operation of transportation system for Canadian and Alaskan natural gas were transferred to the Federal Inspector, Office of Federal Inspector for the Alaska Natural Gas Transportation System, until the first anniversary of the date of initial operation of the Alaska Natural Gas Transportation System, see Reorg. Plan No. 1 of 1979, §§ 102(e), 203(a), 44 Fed. Reg. 33663, 33666, 93 Stat. 1373, 1376, which appear as 5 USCS § 903 note, effective July 1, 1979, pursuant to Ex. Or. No. 12142, § 1-101, June 21, 1979, 44 Fed. Reg. 36927, which appear as 15 USCS § 719c note.

Other provisions:
Application of section. For the application of this section, see Act Feb. 5, 1948, ch 45, § 7, 62 Stat. 18, which appears as 25 USCS § 323 note.

CODE OF FEDERAL REGULATIONS

Rights-of-way over Indian lands, 25 CFR Part 169.

CROSS REFERENCES

This section is referred to in 25 USCS §§ 322, 327, 328, 1724; 43 USCS § 421c.

§ 327. Application for grant by department or agency

Rights-of-way for the use of the United States may be granted under this Act [25 USCS §§ 323 et seq.] upon application by the department or

agency having jurisdiction over the activity for which the right-of-way is to be used.
(Feb. 5, 1948, ch 45, § 5, 62 Stat. 18.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Effective date of section:
For the effective date of this section, see Act Feb. 5, 1948, ch 45, § 7, 62 Stat. 18, which appears as 25 USCS § 323 note.

Transfer of functions:
Enforcement functions of Secretary or other official in Department of Interior relating to compliance with rights-of-way across Indian lands, issued under 25 USCS §§ 321 et seq. with respect to pre-construction, construction, and initial operation of transportation system for Canadian and Alaskan natural gas were transferred to the Federal Inspector, Office of Federal Inspector for the Alaska Natural Gas Transportation System, until the first anniversary of the date of initial operation of the Alaska Natural Gas Transportation System, see Reorg. Plan No. 1 of 1979, §§ 102(e), 203(a), 44 Fed. Reg. 33663, 33666, 93 Stat. 1373, 1376, which appears as 5 USCS § 903 note, effective July 1, 1979, pursuant to Ex. Or. No. 12142, § 1-101, June 21, 1979, 44 Fed. Reg. 36927, which appears as 15 USCS § 719e note.

Other provisions:
Application of section. For the application of this section, see Act Feb. 5, 1948, ch 45, § 7, 62 Stat. 18, which appears as 25 USCS § 323 note.

CODE OF FEDERAL REGULATIONS

Rights-of-way over Indian lands, 25 CFR Part 169.

CROSS REFERENCES

This section is referred to in 25 USCS §§ 322, 326, 328, 1724; 43 USCS 421c.

RESEARCH GUIDE

Am Jur:
61 Am Jur 2d, Pipelines § 25.

§ 328. Rules and regulations

The Secretary of the Interior is hereby authorized to prescribe any necessary regulations for the purpose of administering the provisions of this Act [25 USCS §§ 323 et seq.].
(Feb. 5, 1948, ch 45, § 6, 62 Stat. 18.)

APPENDIX D

6. Act of 18 June 1934, ch. 576, 48 Stat. 987 Section 16, (Indian Reorganization Act; "IRA") (25 U.S.C. §476).

Amendments:

1982. Act Apr. 2, 1982 (effective 10/1/82, as provided by § 402 of such Act, which appears as 28 USCS § 171 note), substituted "Claims Court" for "Court of Claims" wherever appearing.

CROSS REFERENCES

Offsets against awards of Indian Claims Commission, 25 USCS § 70a.

INTERPRETIVE NOTES AND DECISIONS

Where judgment of Court of Claims allowed Indian claims against the government but offset a like amount which the court found to have been gratuitously expended by the government for the benefit of the Indian nation, the gratuity items which have been used as statutory offsets should be specifically designated in the judgment. Chickasaw Nation v United States (1945) 326 US 217, 90 L Ed 25, 66 S Ct 84

§ 476. Organization of Indian tribes; constitution and by-laws; special election

Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and by-laws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and by-laws, when ratified as aforesaid and approved by the Secretary of the Interior, shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and by-laws may be ratified and approved by the Secretary in the same manner as the original constitution and by-laws.

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget [Office of Management and Budget] and the Congress.

(June 18, 1934, ch 576, § 16, 48 Stat. 987.)

APPENDIX E

1. 25 C.F.R. §§256.1-256.31 (1951).

§ 252.7 *Cooperative services.* The Bureau will maintain cooperative services through its superintendents and other personnel to further the purposes of the contract. When mutually agreed to in the contract, the Bureau may maintain on its payroll one or more representatives whose duties shall be described in the contract and the salary and expenses of any such person or persons shall constitute part of the funds to be furnished to the State or other contracting agency.

§ 252.8 *Use of Government property and facilities.* The contract shall specify the terms upon which property, other facilities and equipment of the Government may be used by the State or other agency. All contracts which provide for the use of Government automobiles shall require that the particular State or other agency shall be responsible for the return of the equipment in as good condition as when received, excepting usual wear and tear and depreciation and such agency shall be responsible for all damage or injury done to property or persons and shall carry sufficient insurance to cover same and expressly relieve the Government of any and all liability for any such personal injury or property damages committed while such automobile is in the possession of the contracting agency.

SUBCHAPTER W—RIGHTS-OF-WAY

Part 256—Rights-of-Way Over Indian Lands

Sec.

256.1 Definitions.
256.2 Purpose and scope of regulations.
256.3 Consent of landowners.
256.4 Permission to survey.
256.5 Permission to commence construction.
256.6 Disposition of deposit.
256.7 Application for right-of-way.
256.8 Maps.
256.9 Field notes.
256.10 Public survey.
256.11 Connection with natural objects.
256.12 Township and section lines.
256.13 Affidavit and certificate.
256.14 Appraisal and schedule of damages.
256.15 Deposit of damages.
256.16 Action on application.
256.17 Affidavit of completion.
256.18 Change of location.
256.19 Tenure of approved right-of-way grants.
256.20 Renewal of right-of-way grants.
256.21 Service lines.
256.22 Condemnation suits involving individually owned restricted lands.
256.23 Railroads.
256.24 Railroads in Oklahoma.
256.25 Oil or gas pipelines.
256.26 Telephone and telegraph lines; radio, television, and other communications facilities.
256.27 Power projects.
256.28 Public highways.
256.29 Drainage projects in Oklahoma.
256.30 Withdrawal and restoration of Superintendent's authority.
256.31 Appeals.

AUTHORITY: §§ 256.1 to 256.31 issued under R. S. 161, sec. 1, 30 Stat. 941, sec. 1, 32 Stat. 266, sec. 1, 33 Stat. 359, sec. 4, 37 Stat. 194, sec. 6, 62 Stat. 18; 5 U. S. C. 22, 25 U. S. C. 328. Statutory provisions interpreted or applied are cited to text in parentheses.

SOURCE: §§ 256.1 to 256.31 appear at 16 F. R. 8578, Aug. 25, 1951, except as otherwise noted.

§ 256.1 *Definitions.* As used in this part:

(a) "Secretary" means Secretary of the Interior or his duly authorized representative.

(b) "Commissioner" means Commissioner of Indian Affairs or his duly authorized representative.

(c) "Area Director" means the officer in charge of an Area Office of the Bureau of Indian Affairs or his duly authorized representative.

(d) "Superintendent" means the superintendent or other officer in charge of an Indian Agency, School, Hospital, or other field unit of the Bureau of Indian Affairs.

(e) "Indians" include (1) Indians, (2) Eskimos, or (3) Aleuts.

(f) "Tribe" means a nation, tribe, band, pueblo, community, or other group of Indians residing on a reservation, rancheria, or other reserve within the continental United States or Alaska.

(g) "Tribal Council" means the official council, business committee, or other body, or the governor or other individual, authorized to represent a tribe in consenting to the granting of the rights-of-way provided for in this part.

(h) "Restricted lands" means (1) lands or interests in lands held by the United States in trust for a tribe; (2) lands or interests in lands held by a tribe in restricted fee or Indian title, including Pueblo lands; (3) lands or interests in lands held by the United States in trust for individual Indians; (4) lands or interests in lands held by individual Indians subject to restrictions against alienation; or (5) other lands acquired or set aside by the United States for the use and benefit of Indians.

(i) "Damages" include the compensation, if any, due the landowner for a right-of-way.

§ 256.2 *Purpose and scope of regulations.* (a) Except as indicated in paragraph (b) of this section, the regulations in this part prescribe the procedures, terms, and conditions under which rights-of-way over and across restricted lands may be granted.

NOTE: For irrigation rights-of-way, see sec. 18, 26 Stat. 1101, as amended, 34 Stat. 375; 43 U. S. C. 946.

(b) The regulations in this part do not cover the granting of rights-of-way for primary hydroelectric transmission lines over and across tribal lands. Applications for such rights-of-way must be filed with the Federal Power Commission.

§ 256.3 *Consent of landowners.* (a) No right-of-way shall be granted over and across any restricted lands belonging to a tribe, nor shall any permission to survey or to commence construction be issued with respect to any such lands, without the prior written consent of the tribal council.

(b) Except as provided in paragraph (c) of this section, no right-of-way shall be granted over and across any individually owned restricted lands nor shall any permission to survey or to commence construction be issued with respect to any such lands, without the prior written consent of the owner or owners of such lands and the approval of the Superintendent.

(c) The Superintendent may issue permission to survey or to commence construction with respect to, and he may grant rights-of-way over and across, restricted lands of individual Indians without the consent of the individual Indian owners when (1) the individual owner of the land or of an interest therein is a minor or a person non compos mentis, and the Superintendent finds that such grant will cause no substantial injury to the land or the owner, which cannot be adequately compensated for by monetary damages; (2) the land is owned by more than one person, and the owners or owner of a majority of the interests therein consent to the grant; (3) the whereabouts of the owner of the land or an interest therein are unknown, and the owners or owner of any interests therein whose whereabouts are known, or a majority thereof, consent to the grant;[1] (4) the heirs or devisees of a deceased owner of the land or an interest therein have not been determined, and the Superintendent finds that the grant will cause no substantial injury to the land or any owner thereof; (5) the owners of interests in the land are so numerous that the Superintendent finds it would be impracticable to obtain their consent, and also finds that the grant will cause no substantial injury to the land or any owner thereof.

§ 256.4 *Permission to survey.* Anyone desiring to obtain permission to survey a right-of-way upon and across restricted lands must file a written application therefor with the Superintendent. The application shall adequately describe the proposed project, and it shall be accompanied by the written consent of the landowners as required by § 256.3, by satisfactory evidence of the good faith and financial responsibility of the applicant, and by a check or money order of sufficient amount to cover double the estimated damages which may be sustained as a result of the survey. An application filed by a corporation must be accompanied by proof of corporate existence and of compliance with State laws entitling the applicant to operate in the State in which the restricted land is situated. An application filed by an unincorporated partnership or association must be accompanied by a certified copy of the articles of partnership or association, or, if there be none, this fact must be stated over the signature of each member of the partnership or association. If the applicant has previously filed with the Department an application accompanied by the evidence required in this section, a reference to the date and place of such filing, accompanied by proof of current financial responsibility and good faith,

[1] The language of this subparagraph is taken from 25 U. S. C. 324.

will be sufficient. Upon receipt of an application made in compliance with the regulations of this part, the Superintendent may grant the applicant written permission to survey.

§ 256.5 *Permission to commence construction.* Subject to the provisions of § 256.3, permission to proceed with construction work on a right-of-way may be granted by the Superintendent at the same time or after permit to survey is issued and before full compliance is made with the regulations in this part, provided the applicant deposits with the Superintendent in advance such amount, in addition to that deposited in accordance with § 256.4, as will be sufficient to equal twice the estimated damages which may result from the survey and construction, and agrees in writing to comply promptly with the regulations in this part. The amount of the deposit, if the applicant is an agency of the Federal or of a State Government, will be a sum to cover only the estimated damages whenever it be shown to the satisfaction of the Superintendent that the funds of the applicant are not available for the deposit of the greater amount. Each deposit shall be held in a "special deposit" account until the actual damages have been determined and the application for the right-of-way has been approved.

§ 256.6 *Disposition of deposit.* Except as provided in this section all that part of the deposit required by § 256.5 which is not required for the payment of damages due the landowners shall be refunded to the applicant upon satisfactory completion of the project and compliance with the requirements of § 256.5. Whenever by reason of unnecessary delay or otherwise the applicant fails to show good faith or to exercise due diligence in complying with the regulations of this part, the Superintendent shall, after giving the applicant fifteen days' written notice to show cause why the construction permit should not be rescinded and the application for right-of-way rejected, submit a full report on the matter to the Area Director. If it appears to the satisfaction of the Area Director that the applicant has failed to show good faith or to exercise due diligence in complying with the law and the regulations of this part, the Area Director may rescind the construction permit and reject the application, and notify the applicant of such action and that the entire amount of the applicant's deposit will be paid to the interested Indians as liquidated damages after 30 days from the receipt of such notice unless the applicant files a written notice of appeal from such action pursuant to § 256.31, in which event the deposit shall be held pending the final determination of the appeal.

§ 256.7 *Application for right-of-way.* After a survey has been authorized and completed, formal application, in duplicate, for the right-of-way, if desired, shall be filed promptly with the Superintendent. The application shall cite the statute or statutes under which it is filed and the width and length of the desired right-of-way, and shall be accompanied by a duly executed stipulation expressly agreeing to the following:

(a) To construct and maintain the right-of-way in a workmanlike manner.

(b) To pay promptly all damages, in addition to the deposit made pursuant to § 256.5, determined by the Superintendent to be due the landowners on account of the construction and maintenance of the right-of-way.

(c) To indemnify the landowners against any liability for damages to life or property arising from the occupancy or use of the lands by the applicant.

(d) To restore the lands as nearly as may be possible to their original condition upon the completion of construction.

(e) That the applicant will not interfere with the use of the lands by or under authority of the landowners for any purpose not inconsistent with the primary purpose for which the right-of-way was granted.

§ 256.8 *Maps.* (a) Each application for a right-of-way must be accompanied by a map of definite location on linen tracing in duplicate, and four blue-print copies thereof. Three linen tracings shall be filed if the applicant desires the return of a linen tracing showing the approved right-of-way. The field notes shall accompany the application, as provided for in § 256.9. The width of the right-of-way shall be clearly shown on the linen tracing.

(b) A separate map shall be filed for each section of 20 miles of right-of-way, but the map of the last section may include any excess of 10 miles or less.

(c) The scale of maps showing the line of route normally should be 2,000 feet to an inch. The maps may, however, be

drawn to a larger scale when necessary and when an increase in scale cannot be avoided through the use of separate field notes, but the scale must not be increased to such extent as to make the maps too cumbersome for convenient handling and filing.

(d) The map shall show the name of the allottee and the allotment number of each tract of allotted land, and shall clearly designate each tract of tribal land affected, together with the sections, townships, and ranges in which the lands crossed by the right-of-way are situated.

§ 256.9 *Field notes.* Field notes of the survey shall appear along the line indicating the right-of-way on the map, unless this would be too crowded thereby to be easily legible, in which event the field notes may be filed separately on linen tracing in such form that they may be folded readily for filing. Where field notes are placed on separate linen tracing, it will be necessary to place on the map only a sufficient number of station numbers so as to make it convenient to follow the field notes. The field notes shall be typewritten. Whether endorsed on the map or filed separately, the field notes shall be sufficiently complete so as to permit the line indicating the right-of-way to be readily retraced on the ground from the notes. They shall show whether the line was run on true or magnetic bearings, and, in the latter case, the variation of the needle and date of determination must be stated. One or more bearings (or angular connections with public survey lines) must be given. The 10-mile sections must be indicated and numbered on all lines of road submitted.

§ 256.10 *Public survey.* (a) The termini of the line of route shall be fixed by reference of course and distance to the nearest existing corner of the public survey. The map, as well as the engineer's affidavit and the certificate, shall show these connections.

(b) When either terminal of the line of route is upon unsurveyed land, it must be connected by traverse with an established corner of the public survey, if not more than 6 miles distant from it, and the single bearing and distance from the terminal point to the corner computed and noted on the map, in the engineer's affidavit, and in the certificate. The notes and all data for the computation of the traverse must be given.

§ 256.11 *Connection with natural objects.* When the distance to an established corner of the public survey is more than 6 miles, this connection will be made with a natural object or a permanent monument which can be readily found and recognized, and which will fix and perpetuate the position of the terminal point. The map must show the position of such mark, and course and distance to the terminus. There must be given an accurate description of the mark and full data concerning the traverse, and the engineer's affidavit and the certificate on the map must state the connections.

§ 256.12 *Township and section lines.* Whenever the line of survey crosses a township or section line of the public survey, the distance to the nearest existing corner shall be noted. The map shall show these distances and the station numbers at the points of intersection. The field notes shall show these distances and station numbers.

§ 256.13 *Affidavit and certificate.* (a) There shall be subscribed on the map of definite location an affidavit executed by the engineer who made the survey and a certificate executed by the applicant, both certifying to the accuracy of the survey and map and both designating by termini and length, in miles and decimals, the line of route for which the right of way application is made.

(b) Maps covering roads built by the Bureau of Indian Affairs which are to be transferred to a county or state government shall contain an affidavit as to the accuracy of the survey, executed by the Bureau highway engineer in charge of road construction, and a certificate by the state or county engineer or other authorized state or county officer accepting the right of way and stating that he is satisfied as to the accuracy of the survey and map.

[20 F. R. 1378, Mar. 8, 1955]

§ 256.14 *Appraisal and schedule of damages.* As soon as practicable after a right-of-way application has been filed as provided for in this part, or after the issuance of permission to survey or commence construction, the Superintendent shall cause an appraisal to be made of the damages due the landowners. Upon the basis of the appraisals thus made, the Superintendent shall prepare separate schedules for the

individual lands and for the tribal lands traversed by the right-of-way described in the application. The individual land schedule shall identify thereon the allotment number and the name of the allottee of each forty-acre tract or part of each legal subdivision thereof, and shall set forth in separate columns the acreage taken from each subdivision, the value per acre, the damages to improvements or adjoining land or other property, and the total amount of damages due each land owner. Except for the allotment numbers and the names of the allottees whose lands are involved, the schedule for tribal lands shall contain like information. The Superintendent shall furnish the applicant a copy of the schedules, together with the latest known addresses of the owners.

§ 256.15 *Deposit of damages.* Upon receipt of the schedule of damages, the applicant must deposit with the Superintendent the total amount of damages as shown on the schedules, less any deposit previously made under §§ 256.4 and 256.5. The amount so deposited shall be held in a "special deposit" account for distribution, upon the approval of the application, to or for the account of the owners.

§ 256.16 *Action on application.* Upon satisfactory compliance with the regulations in this part, the Superintendent is authorized to approve the application by endorsing his approval on the map of definite location. Upon approval of the application, the Superintendent shall promptly notify the applicant, and thereafter the applicant may proceed with the construction work, if such permission has not been obtained under § 256.5. One copy of the approved linen tracing of the right-of-way map bearing the written signature of the Superintendent shall be transmitted to the Commissioner. One linen tracing and one blueprint copy of the map of definite location shall be filed with the Bureau of Land Management, except in the case of rights-of-way across lands in Oklahoma. One linen tracing of the map of definite location of the right-of-way across lands in Oklahoma shall be forwarded to the Bureau of Land Management, except that in the case of a right-of-way traversing lands in the Osage or the Five Civilized Tribes Reservations no copy of the map of definite location shall be furnished to the Bureau of Land Management. One copy of the linen tracing shall be forwarded to the applicant if, and only if, three linen tracings were filed as provided in § 256.8.

§ 256.17 *Affidavit of completion.* Upon the completion of the construction of any right-of-way, the applicant shall promptly file with the Superintendent an affidavit of completion, in duplicate, executed by the engineer and certified by the applicant. The Superintendent shall transmit one copy of the affidavit to the Commissioner for filing.

§ 256.18 *Change of location.* If any change from the location shown upon the approved maps is found to be necessary on account of engineering difficulties or otherwise, amended maps and field notes of the new location shall be filed, and a right-of-way for such new route or location shall be subject to approval, the ascertainment of damages, and the payment thereof, in all respects as in the case of the original location, before construction work may proceed upon such new right-of-way, unless permission has been obtained in accordance with § 256.5.

§ 256.19 *Tenure of approved right-of-way grants.* All rights-of-way granted under the regulations in this part shall be in the nature of easements or permits for the periods stated therein. They are terminable upon abandonment or discontinuance of the use for which granted. Rights-of-way for railroads, telephone lines, telegraph lines, and public highways shall be without limitation as to term of years. Rights-of-way for oil or gas pipe lines, and for telephone, telegraph, and water lines incident to the operation of oil and gas pipe lines, shall be limited to 20 years and shall be subject to renewal for a like term upon compliance with the applicable regulations. Rights-of-way for all other purposes shall be for a period of not to exceed 50 years, as fixed by the Superintendent and stated in the grant, and shall be subject to renewal for a like term upon compliance with the applicable regulations.

§ 256.20 *Renewal of right-of-way grants.* On or before the termination date of any right-of-way heretofore or hereafter granted for a limited term of years, an application may be submitted for a renewal of the grant. If the renewal involves no change in the lo-

cation or status of the original right-of-way grant, the applicant may file with his application a certificate under oath setting out this fact, and the superintendent, with the consent of the Indians, may thereupon extend the grant for a like term of years, upon the payment of compensation in the amount fixed and determined by the Superintendent. If any change in the size, type, or location of the right-of-way is involved, the application for renewal shall be treated and handled as in the case of an original application for a right-of-way.

§ 256.21 *Service lines.* (a) An agreement shall be executed by and between the landowner or a legally authorized occupant or user of the land and the applicant before any work by the applicant may be undertaken to construct a service line across such land. Such a service line shall be limited in the case of power lines to a voltage of 7.5 kv or less except lines to serve irrigation pumps which shall be limited to a voltage not to exceed 14.5 kv. Service lines shall be for the sole purpose of supplying the individual owners or authorized occupants or users of land including schools and churches with telephone, water, electric power, gas, or other utilities for domestic and agricultural uses by such owners, occupants or users of the land.

(b) A similar agreement to that required in paragraph (a) of this section shall be executed by the tribe or legally authorized occupant or user of tribal land and the applicant before any work by the applicant may be undertaken on the land for the construction of a service line across such tribal land. Such a service line shall be for the sole purpose of supplying such occupants or users of such tribal land with any of the services dealt with in paragraph (a) of this section. No agreement under this paragraph shall be valid unless its execution shall have been duly authorized in advance of construction by the governing body of the Indian tribe whose land is affected.

(c) In order to encourage the use of telephone, water, electric power, gas or other utilities and facilitate the extension of these modern conveniences to sparsely-settled Indian areas without undue costs the agreement referred to in paragraph (a) of this section shall only be required to include or have appended thereto, a plat or diagram showing with particularity the location, size, and extent of the line. When the plat or diagram is placed on a separate sheet it shall bear the signature of the parties. In case of tribal land, the agreement shall be accompanied by a certified copy of the tribal authorization.

(d) An executed copy of the agreement, together with a plat or diagram, and in the case of tribal land, an authenticated copy of the tribal authorization shall be filed with the superintendent of the reservation on which the service line is to be built within 30 days after the date of its execution. Failure to meet this requirement may result in the removal of any such improvements placed on the land at the expense of the party responsible for the placing of such improvements thereon and subject such party to the payment of damages caused by his unauthorized act.

[18 F. R. 4158, July 16, 1953, as amended at 21 F. R. 1798, Mar. 23, 1956; 21 F. R. 2565, Apr. 19, 1956]

§ 256.22 *Condemnation suits involving individually owned restricted lands.* The facts relating to any condemnation action to obtain a right-of-way upon individually owned restricted land shall be reported immediately by the Superintendent to the Area Director and the Commissioner, in order that appropriate action may be taken to safeguard the interests of the Indians.

§ 256.23 *Railroads.* (a) Rights-of-way for railroads shall not exceed 50 feet in width on each side of the center line of the road, except where there are heavy cuts and fills, when they shall not exceed 100 feet in width on each side of the road. The right-of-way may include grounds adjacent to the line for station buildings, depots, machine shops, side tracks, turnouts, and water stations, not to exceed 200 feet in width by a length of 3,000 feet, with no more than one station to be located within any one continuous length of 10 miles of road.

(b) Short spurs and branch lines may be shown on the map of the main line, separately described by termini and length. Longer spurs and branch lines shall be shown on separate maps. Grounds desired for station purposes may be indicated on the map of definite location but separate plats must be filed for such grounds. The maps shall show any other line crossed, or with

which connection is made. The station number shall be shown on the survey thereof at the point of intersection. All intersecting roads must be represented in ink of a different color from that used for the line for which application is made.

(c) Plats of railroad station grounds shall be drawn on a scale of 400 feet to an inch, and must be filed separately from the line of route. Such plats shall show enough of the line of route to indicate the position of the tract with reference thereto. Each station ground tract must be located with respect to the public survey as provided in § 256.10, and all buildings or other structures shall be platted on a scale sufficiently large to show clearly their dimensions and relative positions.

(d) If any proposed railroad is parallel to, and within 10 miles of, a railroad already built or in course of construction, it must be shown wherein the public interest will be promoted by the proposed road. Where the Interstate Commerce Commission has passed on this point, a certified copy of its findings must be filed with the application.

(e) The applicant must certify that the road is to be operated as a common carrier of passengers and freight.

(f) The applicant shall execute and file, in duplicate, a stipulation obligating the company to use all precautions possible to prevent forest fires and to suppress such fires when they occur, to construct and maintain passenger and freight stations for each Government townsite, and to permit the crossing, in a manner satisfactory to the Government official in charge, of the right-of-way by canals, ditches, and other projects.

(g) A railroad company may apply for sufficient land for ballast or material pits, reservoirs, or tree planting to aid in the construction or maintenance of the road. The authority to use any land for such purposes shall terminate upon abandonment or upon failure to use the land for such purposes for a continuous period of two years.

(Sec. 1, 18 Stat. 482, secs. 1, 2, 30 Stat. 300, as amended, 35 Stat. 781, as amended, secs. 1–5, 62 Stat. 17, 18; 43 U.S.C. 931, 25 U.S.C. 312, 313, 319, 323–327)

§ 256.24 *Railroads in Oklahoma.* (a) Railroad rights-of-way over and across restricted lands in Oklahoma may be acquired in accordance with the provisions of the act of February 28, 1902 (32 Stat. 43).

(b) One copy each on linen tracing of the map of definite location showing the line of route and all lands included within the right-of-way must be filed with the Commissioner and the Superintendent. When tribal lands are involved, a copy of the map must also be filed with the tribal council.

(c) Before any railroad may be constructed or any lands taken or condemned for any of the purposes set forth in section 13 of the act of February 28, 1902 (32 Stat. 43), full damages shall be paid to the Indian owners.

(d) After the maps have been filed, the matter of damages shall be negotiated by the company directly with the Indian owners. If an amicable settlement cannot be reached, the amount to be paid as compensation and damages shall be fixed and determined as provided in the statute. If court proceedings are instituted, the facts shall be reported immediately by the Superintendent to the Area Director and the Commissioner, so that appropriate action may be taken to safeguard the interests of the Indians.

(32 Stat. 43)

§ 256.25 *Oil or gas pipelines.* (a) All oil or gas pipelines, including connecting lines, shall be buried a sufficient depth below the surface of the land so as not to interfere with cultivation. Whenever the line is laid under a road or highway, the right-of-way for which has been granted under an approved application pursuant to an act of Congress, its construction shall be in compliance with the applicable Federal and State laws; during the period of construction, at least one-half the width of the road shall be kept open to travel; and, upon completion, the road or highway shall be restored to its original condition and all excavations shall be refilled. Whenever the line crosses a ravine, canyon, or waterway, it shall be laid below the bed thereof or upon such superstructure as will not interfere with the use of the surface.

(b) The size of the proposed pipeline must be shown in the application, on the map, and in the engineer's affidavit and applicant's certificate. The application and map shall specify whether the pipe is welded, screw-joint, dresser, or other type of coupling. Should the applicant

of an approved right-of-way desire at any time to lay additional line or lines of pipe in the same trench, or to replace the original line with larger or smaller pipe, written permission must first be obtained from the Superintendent and all damages to be sustained by the owners must be paid in advance in the amount fixed and determined by the Superintendent.

(c) Applicants for oil or gas pipeline rights-of-way may apply for additional land for pumping stations or tank sites. The maps shall show clearly the location of all such structures and the location of all lines connecting with the main line. Applicants for lands for pumping stations or tank sites shall execute and file a stipulation agreeing as follows:

(1) Upon abandonment of the right-of-way to level all dikes, fire-guards, and excavations and to remove all concrete masonry foundations, bases, and structural works and to restore the land as nearly as may be possible to its original condition.

(2) That a grant for pumping station or tank site purposes shall be subservient to the owner's right to remove or authorize the removal of oil, gas, and other mineral deposits; and that the structures for pumping station or tank site will be removed or relocated if necessary to avoid interference with the exploration for or recovery of oil, gas, or other minerals.

(d) Purely lateral lines connecting with oil or gas wells on restricted lands may be constructed upon filing with the Superintendent a copy of the written consent of the Indian owners and a blueprint copy of a map showing the location of the lateral. Such lateral lines may be of any diameter or length, but must be limited to those used solely for the transportation of oil or gas from a single tract of restricted land to another lateral or to a branch of the main line.

(e) The applicant, by accepting a pipeline right-of-way, thereby agrees that the books and records of the applicant shall be open to inspection by the Secretary or his duly authorized representative at all reasonable times, in order to obtain information pertaining in any way to oil or gas produced from restricted lands or other lands under the jurisdiction of the Secretary.

(Secs. 1, 2, 33 Stat. 65, as amended, secs. 1–5, 62 Stat. 17, 18; 25 U. S. C. 321, 323–327)

§ 256.26 *Telephone and telegraph lines; radio, television, and other communications facilities.* (a) The application and maps shall specify the width of the right-of-way desired. No right-of-way shall be granted for a width in excess of 50 feet on each side of the center line, unless special requirements are clearly set forth in the application which fully justify a width in excess of 50 feet on each side of the center line.

(b) Applicants engaged in the general telephone and telegraph business may apply for additional land for office sites. The maps showing the location of proposed office sites shall be filed separately from those showing the line of route, and shall be drawn to a scale of 50 feet to an inch. Such maps shall show enough of the line of route to indicate the position of the tract with reference thereto. The tract shall be located with respect to the public survey as provided in § 256.10, and all buildings or other structures shall be platted on a scale sufficiently large to show clearly their dimensions and relative positions.

(c) Rights of way for poles and lines for communication purposes, and for radio, television, and other forms of communication transmitting, relay, and receiving structures and facilities, shall be limited to 200 feet on each side of the centerline of such lines and poles; radio, television, and other forms of communication transmitting, relay, and receiving structures and facilities shall be limited to an area not to exceed 400 feet by 400 feet.

(Secs. 1, 2, 30 Stat. 990, as amended, sec. 3, 31 Stat. 1083, secs. 1–5, 62 Stat. 17, 18, 66 Stat. 95; 25 U. S. C. 312, 313, 319, 323–327)

[16 F. R. 6578, Aug. 25, 1951, as amended at 21 F. R. 8105, Oct. 25, 1956]

§ 256.27 *Power projects.* (a) All applications for authority to survey, locate, or commence construction work on any project for the generation of electric power, or the transmission or distribution of electric power of 33 kv or higher involving lands other than tribal lands dealt with in the exception contained in § 256.2 shall be referred by the superintendent through the area director to the Commissioner who will secure the approval of the Office of the Assistant Secretary of the Interior for Water and Power Development or such other agency as may be designated for the area involved, for consideration of the relation-

ship of the proposed project to the power development program of the United States. Where the proposed project will not conflict with the program of the United States, the area director, upon notification to that effect, will so notify the superintendent, who may then proceed to act upon the application. In the case of necessary changes respecting the proposed location, construction, or utilization of the project in order to eliminate conflicts with the power development program of the United States, the superintendent shall obtain from the applicant written consent to or compliance with such requirements before taking further action on the application.

(b) The application and maps shall specify the width of the right-of-way desired. Rights-of-way for power lines will be limited to 50 feet on each side of the center line unless sufficient justification is furnished for a greater width.

(c) The applicant shall make provision, or bear the reasonable cost (as may be determined by the Secretary) of making provision, for avoiding inductive interference between any project transmission line or other project works constructed, operated, or maintained by it on the right-of-way authorized under the grant and any radio installation, telephone line, or other communication facilities now or hereafter constructed and operated by the United States or any agency thereof. This provision shall not relieve the applicant from any responsibility or requirement which may be imposed by other lawful authority for avoiding or eliminating inductive interference.

(d) An applicant for a right-of-way for a transmission line having a voltage of 33 kv. or more must, in addition to the stipulation required by § 256.7, execute and file with its application a stipulation agreeing to accept the right-of-way grant subject to the following conditions:

(1) The applicant agrees that, in the event it becomes necessary for the United States to acquire the applicant's transmission line or facilities constructed on or across such right-of-way, the United States reserves the right to acquire such line or facilities at a sum to be determined upon by a representative of the applicant, a representative of the Secretary of the Interior, and a third representative to be selected by the other two for the purpose of determining the value of such property thus to be acquired by the United States. No value, however, shall be allowed at any such determination for the right-of-way granted to the applicant under authority of the regulations of this part.

(2) To allow the Department of the Interior to utilize for the transmission of electrical power any surplus capacity of the line in excess of the capacity needed by the holder of the grant for the transmission of electrical power in connection with the applicant's operations, or to increase the capacity of the line at the Department's expense and to utilize the increased capacity for the transmission of electrical power. Utilization by the Department of surplus or increased capacity shall be subject to the following terms and conditions:

(i) When the Department desires to utilize surplus capacity thought to exist in a line, notification will be given to the applicant and the applicant shall furnish to the Department within 30 days a certificate stating whether the line has any surplus capacity not needed by the applicant for the transmission of electrical power in connection with the applicant's operations, and, if so, the extent of such surplus capacity.

(ii) In order to utilize any surplus capacity certified by the applicant to be available, or any increased capacity provided by the Department at its own expense, the Department may interconnect its transmission facilities with the applicant's line in a manner conformable to approved standards of practice for the interconnection of transmission circuits.

(iii) The expense of interconnection will be borne by the Department, and the Department will at all times provide and maintain adequate switching, relaying, and protective equipment so as to insure that the normal and efficient operation of the applicant's line will not be impaired.

(iv) After any interconnection is completed, the applicant shall operate and maintain its line in good condition; and, except in emergencies, shall maintain in a closed position all connections under the applicant's control between the applicant's line and the interconnecting facilities provided by the Department.

(v) The interconnected power systems of the Department and the applicant will be operated in parallel.

(vi) The transmission of electrical power by the Department over the applicant's line will be effected in such manner and quantity as will not interfere unreasonably with the applicant's use and operation of the line in accordance with the applicant's normal operating standards, except that the Department shall have the exclusive right to utilize any increased capacity of the line which has been provided at the Department's expense.

(vii) The applicant will not be obligated to allow the transmission over its line by the Department of electrical power to any person receiving service from the applicant on the date of the filing of the application for a grant, other than persons entitled to a statutory preference in connection with the distribution and sale of electrical power by the Department.

(viii) The Department will pay to the applicant an equitable share of the total monthly cost of maintaining and operating the part of the applicant's line utilized by the Department for the transmission of electrical power, the payment to be an amount in dollars representing the same proportion of the total monthly operation and maintenance cost of such part of the line as the maximum amount in kilowatts of the power transmitted on a scheduled basis by the Department over the applicant's line during the month bears to the total capacity in kilowatts of that part of the line. The total monthly cost may include interest and amortization, in accordance with the system of accounts prescribed by the Federal Power Commission, on the applicant's net total investment (exclusive of any investment by the Department) in the part of the line utilized by the Department.

(ix) If, at any time subsequent to a certification by the applicant that surplus capacity is available for utilization by the Department, the applicant needs for the transmission of electrical power in connection with its operations the whole or any part of the capacity of the line theretofore certified as being surplus to its needs, the applicant may modify or revoke the previous certification by giving the Secretary of the Interior 30 months' notice, in advance, of the applicant's intention in this respect. After the revocation of a certificate, the Department's utilization of the particular line will be limited to the increased capacity, if any, provided by the Department at its expense.

(x) If, during the existence of the grant, the applicant desires reciprocal accommodations for the transmission of electrical power over the interconnecting system of the Department to its line, such reciprocal accommodations will be accorded under terms and conditions similar to those prescribed in this paragraph with respect to the transmission by the Department of electrical power over the applicant's line.

(xi) The terms and conditions prescribed in this paragraph may be modified at any time by means of a supplemental agreement negotiated between the applicant and the Secretary of the Interior or his designee.

(e) Applicants may apply for additional lands for generating plants and appurtenant structures. The lands desired for such purposes may be indicated on the map showing the definite location of the right-of-way, but separate maps must be filed therefor. Such maps shall show enough of the line of route to indicate the position of the tract with respect to said line. The tract shall be located with respect to the public survey as provided in § 256.10, and all buildings or other structures shall be platted on a scale sufficiently large to show clearly their dimensions and relative positions.

(f) Applicants, in lieu of furnishing maps based on surveys, including field notes, as required by §§ 256.8 to 256.13, inclusive, may obtain rights of way for distribution lines of less than 33 kv and telephone lines by filing two linen tracings and four print copies of a drawing showing the size and the location of the line in relation to the boundaries of each tract of land involved. The drawings shall show thereon whether the land to be crossed by the right of way is tribal or allotted. If allotted land, there shall appear on the drawing in addition to the section, township, and range number the name of each allottee and the respective allotment number. Each drawing shall contain a certificate executed by the engineer or the person who prepared the drawing, and the president, or other proper official of the applicant, certifying that the line is located as shown on the drawing.

(31 Stat. 790, as amended, 36 Stat. 1253, as amended, secs. 1–5, 62 Stat. 17, 18; 43 U. S. C. 959, 961, 25 U. S. C. 323–327) [16 F. R. 8582,

Aug. 25, 1951, as amended at 18 F. R. 4159, July 16, 1953; 21 F. R. 8105, Oct. 23, 1956]

§ 256.28 *Public highways.* (a) The appropriate State or local authorities may apply under the regulations in this part for authority to open public highways across restricted lands in accordance with State laws.

(b) In lieu of making application under the regulations in this part, the appropriate State or local authorities in Nebraska or Montana may, upon compliance with the requirements of the act of March 4, 1915 (38 Stat. 1188), lay out and open public highways in accordance with the respective laws of those States. Under the provisions of that act, the applicant must serve the Superintendent with notice of intention to open the proposed road and must submit a linen tracing of a map of definite location showing the width of the proposed road for the approval of the Superintendent prior to the laying out and opening of the road.

(c) Applications for public highway rights-of-way over and across roadless and wild areas shall be considered in accordance with the regulations contained in Part 201 of this chapter.

(Sec. 4, 31 Stat. 1084, 38 Stat. 1188, secs. 1–5, 62 Stat. 17, 18; 25 U. S. C. 311, 323–327)

§ 256.29 *Drainage projects in Oklahoma.* (a) Applications for rights-of-way for drainage purposes and applications for the approval of drainage assessments against individually owned restricted lands in Oklahoma may be filed under the regulations in this part by the County Commissioners of the county or counties in which a drainage district is located. The application shall show that the State laws governing the drainage of lands have been complied with, and the application must be accompanied by a certified copy of the viewer's report, including the viewer's schedule of assessments and damages.

(b) The Superintendent may approve drainage assessments against restricted lands whenever it appears to his satisfaction that the lands are being properly drained and are being assessed justly, in comparison with the assessments made against other lands in the drainage district.

(c) Neither the United States nor the land owner shall be obligated to pay any approved assessment, but the Superintendent may, upon the written request of the land owner, pay the approved assessment out of any funds held under the custody or control of the Department and belonging to the land owner. Unpaid assessments shall not constitute a lien against the restricted lands involved, and none of the laws of Oklahoma relating to the collection of unpaid assessments shall have any application to restricted lands.

(Sec. 4, 37 Stat. 194, 38 Stat. 310, as amended, 41 Stat. 1304)

§ 256.30 *Withdrawal and restoration of Superintendent's authority.* The Commissioner, or the Area Director with the approval of the Commissioner, may, upon written notice to a particular Superintendent, withdraw from such Superintendent the authority granted to Superintendents in the regulations of this part, and thereafter such authority withdrawn from such Superintendent shall be exercised by the Area Director or such other official as may be designated by the Area Director with the approval of the Commissioner. Any such authority withdrawn from a Superintendent may be restored to him by the Area Director with the approval of the Commissioner.

§ 256.31 *Appeals.* Action taken by a Superintendent shall be subject to the right of appeal to the Area Director. Action taken by an Area Director, including action taken on an appeal from a Superintendent, shall be subject to the right of appeal to the Commissioner. Action taken by the Commissioner shall be subject to appeal to the Secretary. An appeal must be filed in writing with the officer from whom the appeal is being taken, and must be filed within 30 days after the receipt of notice respecting the action to which objection is taken. An appeal filed with the Superintendent shall be promptly transmitted by him, with the record in the case, to the Area Director. An appeal filed with the Area Director shall be transmitted promptly by him, with the record in the case, to the Commissioner. An appeal filed with the Commissioner shall be transmitted promptly by the Commissioner, with the record, to the Secretary.

APPENDIX E

2. 25 C.F.R. §161.3 (1981).

part of any project for which a license is required by the Federal Power Act. The Federal Power Act provides that any license which shall be issued to use tribal lands within a reservation shall be subject to and contain such conditions as the Secretary of the Interior shall deem necessary for the adequate protection and utilization of such lands. (16 U.S.C. 797(e)). In the case of tribal lands belonging to a tribe organized under the Act of June 18, 1934 (48 Stat. 984), the Federal Power Act requires that annual charges for the use of such tribal lands under any license issued by the Federal Power Commission shall be subject to the approval of the tribe (16 U.S.C. 803(e)).

§ 161.3 Consent of landowners to grants of right-of-way.

(a) No right-of-way shall be granted over and across any tribal land, nor shall any permission to survey be issued with respect to any such lands, without the prior written consent of the tribe.

(b) Except as provided in paragraph (c) of this section, no right-of-way shall be granted over and across any individually owned lands, nor shall any permission to survey be issued with respect to any such lands, without the prior written consent of the owner or owners of such lands and the approval of the Secretary.

(c) The Secretary may issue permission to survey with respect to, and he may grant rights-of-way over and across individually owned lands without the consent of the individual Indian owners when (1) the individual owner of the land or of an interest therein is a minor or a person non compos mentis, and the Secretary finds that such grant will cause no substantial injury to the land or the owner, which cannot be adequately compensated for by monetary damages; (2) the land is owned by more than one person, and the owners or owner of a majority of the interests therein consent to the grant; (3) the whereabouts of the owner of the land or an interest therein are unknown, and the owners or owner of any interests therein whose whereabouts are known, or a majority thereof, consent to the grant; (4) the heirs or devisees of a deceased owner of the land or an interest therein have not been determined, and the Secretary finds that the grant will cause no substantial injury to the land or any owner thereof; (5) the owners of interests in the land are so numerous that the Secretary finds it would be impracticable to obtain their consent, and also finds that the grant will cause no substantial injury to the land or any owner thereof.

[36 FR 14183, July 31, 1971]

§ 161.4 Permission to survey.

Anyone desiring to obtain permission to survey for a right-of-way across individually owned, tribal or Government owned land must file a written application therefor with the Secretary. The application shall adequately describe the proposed project, including the purpose and general location, and it shall be accompanied by the written consents required by § 161.3, by satisfactory evidence of the good faith and financial responsibility of the applicant, and by a check or money order of sufficient amount to cover twice the estimated damages which may be sustained as a result of the survey. With the approval of the Secretary, a surety bond may be substituted in lieu of a check or money order accompanying an application, provided the company issuing the surety bond is licensed to do business in the State where the land to be surveyed is located. The application shall contain an agreement to indemnify the United States, the owners of the land, and occupants of the land, against liability for loss of life, personal injury and property damage occurring because of survey activities and caused by the applicant, his employees, contractors and their employees, or subcontractors and their employees. When the applicant is an agency or instrumentality of the Federal or a State Government and is prohibited by law from depositing estimated damages in advance or agreeing to indemnification, the requirement for such a deposit and indemnification may be waived providing the applicant agrees in writing to pay damages promptly

APPENDIX E

3. 25 C.F.R. §§169.1-169.28 (1982).

§ 168.20 Grazing privileges of persons awaiting relocation.

Any person awaiting relocation, as defined in § 168.1(h), shall be eligible for a grazing permit for lands within the former joint use area under the following terms and conditions.

(a) The project officer shall first verify that an applicant meets the criteria of the definition, § 168.1(h).

(b) Permits will be issued by the Project Officer directly to persons awaiting relocation. The permit will not authorize the grazing of more livestock than the person was grazing at the time of the entry of the Judgment of Partition; nor will more than a subsistence number of livestock be permitted to a person. The determination of the person to whom permits will be issued and the subsistence number of livestock to be permitted to a person will be based on information provided by the permit applicant and an assessment of the following factors: (1) The number of dependents in the household and their dietary and household needs; and (2) the age, education and income prospects of the applicant.

(c) The permit shall be for a specific number and kind of animal(s) which shall not exceed the number of animal units of the Flagstaff Administrative Office's livestock inventory as of February 10, 1977. No such permits will be issued that exceed one-half the carrying capacity of a range unit.

(d) Grazing fees will be assessed and paid in accordance with the Settlement Act provision for rental of the other tribe's lands by persons who are not members, 25 U.S.C. 640d-5. The project officer will determine the fair rental value as grazing fees and the respective tribes will be responsible for payment of the fees for their members' use. Other fees and/or taxes may be separately assessed by the tribe on whose lands the person awaiting relocation is grazing permitted livestock, but such fees and/or taxes shall not be assessed at a rate greater than that charged to members of the tribe on whose reservation lands the person grazes the livestock.

(e) Subject to the provision of § 168.10(b), permits shall expire when the person awaiting relocation is relocated pursuant to the Settlement Act or on the date a final order is entered (and any appeals concluded) requiring the person to relocate, whichever is earlier. No permit will be issued for a term greater than one year. Permits may be reissued upon application and redetermination of eligibility. All permits will expire at the end of the period provided by the Settlement Act for the completion of relocation, 25 U.S.C. 640d-13(e). If and when a Navajo permit holder discontinues grazing animals, whether by reason of his relocating or for any other voluntary reason, his grazing permit shall be canceled and no permit shall be issued in lieu thereof; and the number of animals being grazed by the Navajo permit holders shall be reduced by the number of animals covered by the canceled permit.

[44 FR 47332, Aug. 13, 1979. Redesignated at 47 FR 13327, Mar. 30, 1982]

PART 169—RIGHTS-OF-WAY OVER INDIAN LANDS

Sec.

169.1 Definitions.
169.2 Purpose and scope of regulations.
169.3 Consent of landowners to grants of right-of-way.
169.4 Permission to survey.
169.5 Application for right-of-way.
169.6 Maps.
169.7 Field notes.
169.8 Public survey.
169.9 Connection with natural objects.
169.10 Township and section lines.
169.11 Affidavit and certificate.
169.12 Consideration for right-of-way grants.
169.13 Other damages.
169.14 Deposit and disbursement of consideration and damages.
169.15 Action on application.
169.16 Affidavit of completion.
169.17 Change of location.
169.18 Tenure of approved right-of-way grants.
169.19 Renewal of right-of-way grants.
169.20 Termination of right-of-way grants.
169.21 Condemnation actions involving individually owned lands.
169.22 Service lines.
169.23 Railroads.
169.24 Railroads in Oklahoma.
169.25 Oil and gas pipelines.
169.26 Telephone and telegraph lines; radio, television and other communications facilities.
169.27 Power projects.
169.28 Public highways.

AUTHORITY: 5 U.S.C. 301, 62 Stat. 17 (25 U.S.C. 323–328), and other acts cited in the text.

SOURCE: 33 FR 19803, Dec. 27, 1968, unless otherwise noted. Redesignated at 47 FR 13327, Mar. 30, 1982.

§ 169.1 Definitions.

As used in this Part 169:

(a) "Secretary" means the Secretary of the Interior or his authorized representative acting under delegated authority. Before proceeding under these regulations, anyone desiring a right-of-way should inquire at the Indian Agency, Area Field Office, or other office of the Bureau of Indian Affairs having immediate supervision over the lands involved to determine the identity of the authorized representative of the Secretary for the purposes of this Part 169.

(b) "Individually owned land" means land or any interest therein held in trust by the United States for the benefit of individual Indians and land or any interest therein held by individual Indians subject to Federal restrictions against alienation or encumbrance.

(c) "Tribe" means a tribe, band, nation, community, group or pueblo of Indians.

(d) "Tribal land" means land or any interest therein, title to which is held by the United States in trust for a tribe, or title to which is held by any tribe subject to Federal restrictions against alienation or encumbrance, and includes such land reserved for Indian Bureau administrative purposes. The term also includes lands held by the United States in trust for an Indian corporation chartered under section 17 of the Act of June 18, 1934 (48 Stat. 988; 25 U.S.C. 477).

(e) "Government owned land" means land owned by the United States and under the jurisdiction of the Secretary which was acquired or set aside for the use and benefit of Indians and not included in the definitions set out in paragraphs (b) and (d) of this section.

§ 169.2 Purpose and scope of regulations.

(a) Except as otherwise provided in § 1.2 of this chapter, the regulations in this Part 169 prescribe the procedures, terms and conditions under which rights-of-way over and across tribal land, individually owned land and Government owned land may be granted.

(b) Appeals from administrative action taken under the regulations in this Part 169 shall be made in accordance with Part 2 of this chapter.

(c) The regulations contained in this Part 169 do not cover the granting of rights-of-way upon tribal lands within a reservation for the purpose of constructing, operating, or maintaining dams, water conduits, reservoirs, powerhouses, transmission lines or other works which shall constitute a part of any project for which a license is required by the Federal Power Act. The Federal Power Act provides that any license which shall be issued to use tribal lands within a reservation shall be subject to and contain such conditions as the Secretary of the Interior shall deem necessary for the adequate protection and utilization of such lands. (16 U.S.C. 797(e)). In the case of tribal lands belonging to a tribe organized under the Act of June 18, 1934 (48 Stat. 984), the Federal Power Act requires that annual charges for the use of such tribal lands under any license issued by the Federal Power Commission shall be subject to the approval of the tribe (16 U.S.C. 803(e)).

§ 169.3 Consent of landowners to grants of right-of-way.

(a) No right-of-way shall be granted over and across any tribal land, nor shall any permission to survey be issued with respect to any such lands, without the prior written consent of the tribe.

(b) Except as provided in paragraph (c) of this section, no right-of-way shall be granted over and across any individually owned lands, nor shall any permission to survey be issued with respect to any such lands, without the prior written consent of the owner or owners of such lands and the approval of the Secretary.

(c) The Secretary may issue permission to survey with respect to, and he may grant rights-of-way over and

across individually owned lands without the consent of the individual Indian owners when (1) the individual owner of the land or of an interest therein is a minor or a person non compos mentis, and the Secretary finds that such grant will cause no substantial injury to the land or the owner, which cannot be adequately compensated for by monetary damages; (2) the land is owned by more than one person, and the owners or owner of a majority of the interests therein consent to the grant; (3) the whereabouts of the owner of the land or an interest therein are unknown, and the owners or owner of any interests therein whose whereabouts are known, or a majority thereof, consent to the grant; (4) the heirs or devisees of a deceased owner of the land or an interest therein have not been determined, and the Secretary finds that the grant will cause no substantial injury to the land or any owner thereof; (5) the owners of interests in the land are so numerous that the Secretary finds it would be impracticable to obtain their consent, and also finds that the grant will cause no substantial injury to the land or any owner thereof.

[36 FR 14183, July 31, 1971. Redesignated at 47 FR 13327, Mar. 30, 1982]

§ 169.4 Permission to survey.

Anyone desiring to obtain permission to survey for a right-of-way across individually owned, tribal or Government owned land must file a written application therefor with the Secretary. The application shall adequately describe the proposed project, including the purpose and general location, and it shall be accompanied by the written consents required by § 169.3, by satisfactory evidence of the good faith and financial responsibility of the applicant, and by a check or money order of sufficient amount to cover twice the estimated damages which may be sustained as a result of the survey. With the approval of the Secretary, a surety bond may be substituted in lieu of a check or money order accompanying an application, provided the company issuing the surety bond is licensed to do business in the State where the land to be surveyed is located. The application shall contain an agreement to indemnify the United States, the owners of the land, and occupants of the land, against liability for loss of life, personal injury and property damage occurring because of survey activities and caused by the applicant, his employees, contractors and their employees, or subcontractors and their employees. When the applicant is an agency or instrumentality of the Federal or a State Government and is prohibited by law from depositing estimated damages in advance or agreeing to indemnification, the requirement for such a deposit and indemnification may be waived providing the applicant agrees in writing to pay damages promptly when they are sustained. An application filed by a corporation must be accompanied by a copy of its charter or articles of incorporation duly certified by the proper State official of the State where the corporation was organized, and a certified copy of the resolution or bylaws of the corporation authorizing the filing of the application. When the land covered by the application is located in a State other than that in which the application was incorporated, it must also submit a certificate of the proper State official that the applicant is authorized to do business in the State where the land is located. An application filed by an unincorporated partnership or association must be accompanied by a certified copy of the articles of partnership or association, or if there be none, this fact must be stated over the signature of each member of the partnership or association. If the applicant has previously filed with the Secretary an application accompanied by the evidence required in this section, a reference to the date and place of such filing, accompanied by proof of current financial responsibility and good faith, will be sufficient. Upon receipt of an application made in compliance with the regulations of this Part 169, the Secretary may grant the applicant written permission to survey.

§ 169.5 Application for right-of-way.

Written application identifying the specific use requested shall be filed in

duplicate with the Secretary. The application shall cite the statute or statutes under which it is filed and the width and length of the desired right-of-way, and shall be accompanied by satisfactory evidence of the good faith and financial responsibility of the applicant. An application filed by a corporation must be accompanied by a copy of its charter or articles of incorporation duly certified by the proper State official of the State where the corporation was organized, and a certified copy of the resolution or bylaws of the corporation authorizing the filing of the application. When the land covered by the application is located in a State other than that in which the applicant was incorporated, it must also submit a certificate of the proper State official that the applicant is authorized to do business in the State where the land is located. An application filed by an unincorporated partnership or association must be accompanied be a certified copy of the articles of partnership or association, or if there be none, this fact must be stated over the signature of each member of the partnership or association. If the applicant has previously filed with the Secretary an application accompanied by the evidence required by this section, a reference to the date and place of such filing will be sufficient. Except as otherwise provided in this section, the application shall be accompanied by a duly executed stipulation, in duplicate, expressly agreeing to the following:

(a) To construct and maintain the right-of-way in a workmanlike manner.

(b) To pay promptly all damages and compensation, in addition to the deposit made pursuant to § 169.4, determined by the Secretary to be due the landowners and authorized users and occupants of the land on account of the survey, granting, construction and maintenance of the right-of-way.

(c) To indemnify the landowners and authorized users and occupants against any liability for loss of life, personal injury and property damage arising from the construction, maintenance, occupancy or use of the lands by the applicant, his employees contractors and their employees, or subcontractors and their employees.

(d) To restore the lands as nearly as may be possible to their original condition upon the completion of construction to the extent compatible with the purpose for which the right-of-way was granted.

(e) To clear and keep clear the lands within the right-of-way to the extent compatible with the purpose of the right-of-way; and to dispose of all vegetative and other material cut, uprooted, or otherwise accumulated during the construction and maintenance of the project.

(f) To take soil and resource conservation and protection measures, including weed control, on the land covered by the right-of-way.

(g) To do everything reasonably within its power to prevent and suppress fires on or near the lands to be occupied under the right-of-way.

(h) To build and repair such roads, fences, and trails as may be destroyed or injured by construction work and to build and maintain necessary and suitable crossings for all roads and trails that intersect the works constructed, maintained, or operated under the right-of-way.

(i) That upon revocation or termination of the right-of-way, the applicant shall, so far as is reasonably possible, restore the land to its original condition.

(j) To at all times keep the Secretary informed of its address, and in case of corporations, of the address of its principal place of business and of the names and addresses of its principal officers.

(k) That the applicant will not interfere with the use of the lands by or under the authority of the landowners for any purpose not inconsistent with the primary purpose for which the right-of-way is granted.

When the applicant is the U.S. Government or a State Government or an instrumentality thereof and is prohibited by law from executing any of the above stipulations, the Secretary may waive the requirement that the applicant agree to any stipulations so prohibited.

(33 FR 19803, Dec. 27, 1968, as amended at 45 FR 45910, July 8, 1980. Redesignated at 47 FR 13327, Mar. 30, 1982)

§ 169.6 Maps.

(a) Each application for a right-of-way shall be accompanied by maps of definite location consisting of an original on tracing linen or other permanent and reproducible material and two reproductions thereof. The field notes shall accompany the application, as provided in § 169.7. The width of the right-of-way shall be clearly shown on the maps.

(b) A separate map shall be filed for each section of 20 miles of right-of-way, but the map of the last section may include any excess of 10 miles or less.

(c) The scale of maps showing the line of route normally should be 2,000 feet to an inch. The maps may, however, be drawn to a larger scale when necessary and when an increase in scale cannot be avoided through the use of separate field notes, but the scale must not be increased to such extent as to make the maps too cumbersome for convenient handling and filing.

(d) The maps shall show the allotment number of each tract of allotted land, and shall clearly designate each tract of tribal land affected, together with the sections, townships, and ranges in which the lands crossed by the right-of-way are situated.

§ 169.7 Field notes.

Field notes of the survey shall appear along the line indicating the right-of-way on the maps, unless the maps would be too crowded thereby to be easily legible, in which event the field notes may be filed separately on tracing linen in such form that they may be folded readily for filing. Where field notes are placed on separate tracing linen it will be necessary to place on the maps only a sufficient number of station numbers so as to make it convenient to follow the field notes. The field notes shall be typewritten. Whether endorsed on the maps or filed separately, the field notes shall be sufficiently complete so as to permit the line indicating the right-of-way to be readily retraced on the ground from the notes. They shall show whether the line was run on true or magnetic bearings, and, in the latter case, the variation of the needle and date of determination must be stated. One or more bearings (or angular connections with public survey lines) must be given. The 10-mile sections must be indicated and numbered on all lines of road submitted.

§ 169.8 Public survey.

(a) The terminal of the line of route shall be fixed by reference of course and distance to the nearest existing corner of the public survey. The maps, as well as the engineer's affidavit and the certificate, shall show these connections.

(b) When either terminal of the line of route is upon unsurveyed land, it must be connected by traverse with an established corner of the public survey if not more than 6 miles distant from it, and the single bearing and distance from the terminal point to the corner computed and noted on the maps, in the engineer's affidavit, and in the certificate. The notes and all data for the computation of the traverse must be given.

§ 169.9 Connection with natural objects.

When the distance to an established corner of the public survey is more than 6 miles, this connection will be made with a natural object or a permanent monument which can be readily found and recognized, and which will fix and perpetuate the position of the terminal point. The maps must show the position of such mark, and course and distance to the terminus. There must be given an accurate description of the mark and full data concerning the traverse, and the engineer's affidavit and the certificate on the maps must state the connections.

§ 169.10 Township and section lines.

Whenever the line of survey crosses a township or section line of the public survey, the distance to the nearest existing corner shall be noted. The maps shall show these distances and the station numbers at the points of intersections. The field notes shall show these distances and the station numbers.

§ 169.11 Affidavit and certificate.

(a) There shall be subscribed on the maps of definite location an affidavit executed by the engineer who made the survey and a certificate executed by the applicant, both certifying to the accuracy of the survey and maps and both designating by termini and length in miles and decimals, the line of route for which the right-of-way application is made.

(b) Maps covering roads built by the Bureau of Indian Affairs which are to be transferred to a county or State government shall contain an affidavit as to the accuracy of the survey, executed by the Bureau highway engineer in charge of road construction, and a certificate by the State or county engineer or other authorized State or county officer accepting the right-of-way and stating that he is satisfied as to the accuracy of the survey and maps.

§ 169.12 Consideration for right-of-way grants.

Except when waived in writing by the landowners or their representatives as defined in § 169.3 and approved by the Secretary, the consideration for any right-of-way granted or renewed under this Part 169 shall be not less than but not limited to the fair market value of the rights granted, plus severance damages, if any, to the remaining estate. The Secretary shall obtain and advise the landowners of the appraisal information to assist them (the landowner or landowners) in negotiations for a right-of-way or renewal.

[45 FR 45910, July 8, 1980. Redesignated at 47 FR 13327, Mar. 30, 1982]

§ 169.13 Other damages.

In addition to the consideration for a grant of right-of-way provided for by the provisions of § 169.12, the applicant for a right-of-way will be required to pay all damages incident to the survey of the right-of-way or incident to the construction or maintenance of the facility for which the right-of-way is granted.

§ 169.14 Deposit and disbursement of consideration and damages.

At the time of filing an application for right-of-way, the applicant must deposit with the Secretary the total estimated consideration and damages, which shall include consideration for the right-of-way, severance damages, damages caused during the survey, and estimated damages to result from construction less any deposit previously made under § 169.4. In no case shall the amount deposited as consideration for the right-of-way over any parcel be less than the amount specified in the consent covering that parcel. If in reviewing the application, the Secretary determines that the amounts deposited are inadequate to compensate the owners, the applicant shall increase the deposit to an amount determined by the Secretary to be adequate. The amounts so deposited shall be held in a "special deposit" account for distribution to or for the account of the landowners and authorized users and occupants of the land. Amounts deposited to cover damages resulting from survey and construction may be disbursed after the damages have been sustained. Amounts deposited to cover consideration for the right-of-way and severance damages shall be disbursed upon the granting of the right-of-way. Any part of the deposit which is not required for disbursement as aforesaid shall be refunded to the applicant promptly following receipt of the affidavit of completion of construction filed pursuant to § 169.16.

§ 169.15 Action on application.

Upon satisfactory compliance with the regulations in this Part 169, the Secretary is authorized to grant the right-of-way by issuance of a conveyance instrument in the form approved by the Secretary. Such instrument shall incorporate all conditions or restrictions set out in the consents obtained pursuant to § 169.3. A copy of such instrument shall be promptly delivered to the applicant and thereafter the applicant may proceed with the construction work. Maps of definite location may be attached to and incorporated into the conveyance document by reference. In the discretion of the

Secretary, one conveyance document may be issued covering all of the tracts of land traversed by the right-of-way, or separate conveyances may be made covering one or several tracts included in the application. A duplicate original copy of the conveyance instrument, permanent and reproducible maps, a copy of the application and stipulations, together with any other pertinent documents shall be transmitted by the Secretary to the office of record for land documents affecting the land covered by the right-of-way, where they will be recorded and filed.

§ 169.16 Affidavit of completion.

Upon the completion of the construction of any right-of-way the applicant shall promptly file with the Secretary an affidavit of completion, in duplicate, executed by the engineer and certified by the applicant. The Secretary shall transmit one copy of the affidavit to the office of record mentioned in § 169.15. Failure to file an affidavit in accordance with this section shall subject the right-of-way to cancellation in accordance with § 169.20.

§ 169.17 Change of location.

If any change from the location described in the conveyance instrument is found to be necessary on account of engineering difficulties or otherwise, amended maps and field notes of the new location shall be filed, and a right-of-way for such new route or location shall be subject to consent, approval, the ascertainment of damages, and the payment thereof, in all respects as in the case of the original location. Before a revised conveyance instrument is issued, the applicant shall execute such instruments deemed necessary by the Secretary extinguishing the right-of-way at the original location. Such instruments shall be transmitted by the Secretary to the office of record mentioned in § 169.15 for recording and filing.

§ 169.18 Tenure of approved right-of-way grants.

All rights-of-way granted under the regulations in this Part 169 shall be in the nature of easements for the periods stated in the conveyance instrument. Except as otherwise determined by the Secretary and stated in the conveyance instrument, rights-of-way granted under the Act of February 5, 1948 (62 Stat. 17; 25 U.S.C. 323-328), for railroads, telephone lines, telegraph lines, public roads and highways, access roads to homesite properties, public sanitary and storm sewer lines including sewage disposal and treatment plants, water control and use projects (including but not limited to dams, reservoirs, flowage easements, ditches, and canals), oil, gas, and public utility water pipelines (including pumping stations and appurtenant facilities), electric power projects, generating plants, switchyards, electric transmission and distribution lines (including poles, towers, and appurtenant facilities), and for service roads and trails essential to any of the aforestated use purposes, may be without limitation as to term of years; whereas, rights-of-way for all other purposes shall be for a period of not to exceed 50 years, as determined by the Secretary and stated in the conveyance instrument.

[37 FR 12037, June 30, 1972. Redesignated at 47 FR 13327, Mar. 30, 1982]

§ 169.19 Renewal of right-of-way grants.

On or before the expiration date of any right-of-way heretofore or hereafter granted for a limited term of years, an application may be submitted for a renewal of the grant. If the renewal involves no change in the location or status of the original right-of-way grant, the applicant may file with his application a certificate under oath setting out this fact, and the Secretary, with the consent required by § 169.3, may thereupon extend the grant for a like term of years, upon the payment of consideration as set forth in § 169.12. If any change in the size, type, or location of the right-of-way is involved, the application for renewal shall be treated and handled as in the case of an original application for a right-of-way.

§ 169.20 Termination of right-of-way grants.

All rights-of-way granted under the regulations in this part may be terminated in whole or in part upon 30 days written notice from the Secretary mailed to the grantee at its latest address furnished in accordance with § 169.5(j) for any of the following causes:

(a) Failure to comply with any term or condition of the grant or the applicable regulations;

(b) A nonuse of the right-of-way for a consecutive 2-year period for the purpose for which it was granted;

(c) An abandonment of the right-of-way.

If within the 30-day notice period the grantee fails to correct the basis for termination, the Secretary shall issue an appropriate instrument terminating the right-of-way. Such instrument shall be transmitted by the Secretary to the office of record mentioned in § 169.15 for recording and filing.

[33 FR 19803, Dec. 27, 1968, as amended at 45 FR 45910, July 8, 1980. Redesignated at 47 FR 13327, Mar. 30, 1982]

§ 169.21 Condemnation actions involving individually owned lands.

The facts relating to any condemnation action to obtain a right-of-way over individually owned lands shall be reported immediately by officials of the Bureau of Indian Affairs having knowledge of such facts to appropriate officials of the Interior Department so that action may be taken to safeguard the interests of the Indians.

§ 169.22 Service lines.

(a) An agreement shall be executed by and between the landowner or a legally authorized occupant or user of individually owned land and the applicant before any work by the applicant may be undertaken to construct a service line across such land. Such a service line shall be limited in the case of power lines to a voltage of 14.5 kv. or less except lines to serve irrigation pumps and commercial and industrial uses which shall be limited to a voltage not to exceed 34.5 kv. A service line shall be for the sole purpose of supplying the individual owner or authorized occupant or user of land, including schools and churches, with telephone, water, electric power, gas, and other utilities for use by such owner, occupant, or user of the land on the premises.

(b) A similar agreement to that required in paragraph (a) of this section shall be executed by the tribe or legally authorized occupant or user of tribal land and the applicant before any work by the applicant may be undertaken for the construction of a service line across tribal land. A service line shall be for the sole purpose of supplying an occupant or user of tribal land with any of the utilities specified in paragraph (a) of this section. No agreement under this paragraph shall be valid unless its execution shall have been duly authorized in advance of construction by the governing body of the Indian tribe whose land is affected, unless the contract under which the occupant or user of the land obtained his rights specifically authorizes such occupant or user to enter into service agreements for utilities without further tribal consent.

(c) In order to encourage the use of telephone, water, electric power, gas and other utilities and to facilitate the extension of these modern conveniences to sparsely settled Indian areas without undue costs the agreement referred to in paragraph (a) of this section shall only be required to include or have appended thereto, a plat or diagram showing with particularity the location, size, and extent of the line. When the plat or diagram is placed on a separate sheet it shall bear the signature of the parties. In case of tribal land, the agreement shall be accompanied by a certified copy of the tribal authorization when required.

(d) An executed copy of the agreement, together with a plat or diagram, and in the case of tribal land, an authenticated copy of the tribal authorization, when required, shall be filed with the Secretary within 30 days after the date of its execution. Failure to meet this requirement may result in the removal of improvements placed on the land at the expense of the party responsible for the placing of such improvements and subject such party to

the payment of damages caused by his unauthorized act.

§ 169.23 Railroads.

(a) The Act of March 2, 1899 (30 Stat. 990), as amended by the Acts of February 28, 1902 (32 Stat. 50), June 21, 1906 (34 Stat. 330), and June 25, 1910 (36 Stat. 859; 25 U.S.C. 312—318); the Act of March 3, 1875 (18 Stat. 482; 43 U.S.C. 934); and the Act of March 3, 1909 (35 Stat. 781), as amended by the Act of May 6, 1910 (36 Stat. 349; 25 U.S.C. 320), authorize grants of rights-of-way across tribal, individually owned and Government-owned land, except in the State of Oklahoma, for railroads, station buildings, depots, machine shops, side tracks, turnouts, and water stations; for reservoirs, material or ballast pits needed to the construction, repair, and maintenance of railroads; and for the planting and growing of trees to protect railroad lines. Rights-of-way granted under the above acts shall be subject to the provisions of this section as well as other pertinent sections of this Part 169. Except when otherwise determined by the Secretary, rights-of-way for the above purposes granted under the Act of February 5, 1948 (62 Stat. 17; 25 U.S.C. 323 328), shall also be subject to the provisions of this section.

(b) Rights-of-way for railroads shall not exceed 50 feet in width on each side of the centerline of the road, except where there are heavy cuts and fills, when they shall not exceed 100 feet in width on each side of the road. The right-of-way may include grounds adjacent to the line for station buildings, depots, machine shops, side tracks, turnouts, and water stations, not to exceed 200 feet in width by a length of 3,000 feet, with no more than one station to be located within any one continuous length of 10 miles of road.

(c) Short spurs and branch lines may be shown on the map of the main line, separately described by termini and length. Longer spurs and branch lines shall be shown on separate maps. Grounds desired for station purposes may be indicated on the map of definite location but separate plats must be filed for such grounds. The maps shall show any other line crossed, or with which connection is made. The station number shall be shown on the survey thereof at the point of intersection. All intersecting roads must be represented in ink of a different color from that used for the line for which application is made.

(d) Plats of railroad station grounds shall be drawn on a scale of 400 feet to an inch, and must be filed separately from the line of route. Such plats shall show enough of the line of route to indicate the position of the tract with reference thereto. Each station ground tract must be located with respect to the public survey as provided in § 169.8 and all buildings or other structures shall be platted on a scale sufficiently large to show clearly their dimensions and relative positions.

(e) If any proposed railroad is parallel to, and within 10 miles of, a railroad already built or in course of construction, it must be shown wherein the public interest will be promoted by the proposed road. Where the Interstate Commerce Commission has passed on this point, a certified copy of its findings must be filed with the application.

(f) The applicant must certify that the road is to be operated as a common carrier of passengers and freight.

(g) The applicant shall execute and file, in duplicate, a stipulation obligating the company to use all precautions possible to prevent forest fires and to suppress such fires when they occur, to construct and maintain passenger and freight stations for each Government townsite, and to permit the crossing, in a manner satisfactory to the Government officials in charge, of the right-of-way by canals, ditches, and other projects.

(h) A railroad company may apply for sufficient land for ballast or material pits, reservoirs, or tree planting to aid in the construction or maintenance of the road. The authority to use any land for such purposes shall terminate upon abandonment or upon failure to use the land for such purposes for a continuous period of 2 years.

§ 169.21 Railroads in Oklahoma.

(a) The Act of February 28, 1902 (32 Stat. 43), authorizes right-of-way grants across tribal and individually owned land in Oklahoma. Rights-of-way granted under that act shall be subject to the provisions of this section as well as other pertinent sections of this Part 169. Except when otherwise determined by the Secretary, railroad rights-of-way in Oklahoma granted under the Act of February 5, 1948 (62 Stat. 17; 25 U.S.C. 323-328), shall also be subject to the provisions of this section.

(b) One copy on tracing linen of the map of definite location showing the line of route and all lands included within the right-of-way must be filed with the Secretary. When tribal lands are involved, a copy of the map must also be filed with the tribal council.

(c) Before any railroad may be constructed or any lands taken or condemned for any of the purposes set forth in section 13 of the Act of February 28, 1902 (32 Stat. 47), full damages shall be paid to the Indian owners.

(d) After the maps have been filed, the matter of damages shall be negotiated by the applicant directly with the Indian owners. If an amicable settlement cannot be reached, the amount to be paid as compensation and damages shall be fixed and determined as provided in the statute. If court proceedings are instituted, the facts shall be reported immediately as provided in § 169.21.

§ 169.25 Oil and gas pipelines.

(a) The Act of March 11, 1904 (33 Stat. 65), as amended by the Act of March 2, 1917 (39 Stat. 973; 25 U.S.C. 321), authorizes right-of-way grants for oil and gas pipelines across tribal, individually owned and Government-owned land. Rights-of-way granted under that act shall be subject to the provisions of this section as well as other pertinent sections of this Part 169. Except when otherwise determined by the Secretary, rights-of-way granted for such purposes under the Act of February 5, 1948 (62 Stat. 17; 25 U.S.C. 323-328) shall also be subject to the provisions of this section.

(b) Rights-of-way, granted under aforesaid Act of March 11, 1904, as amended, for oil and gas pipelines, pumping stations or tank sites shall not extend beyond a term of 20 years and may be extended for another period of not to exceed 20 years following the procedures set out in § 169.19 of this part.

(c) All oil or gas pipelines, including connecting lines, shall be buried a sufficient depth below the surface of the land so as not to interfere with cultivation. Whenever the line is laid under a road or highway, the right-of-way for which has been granted under an approved application pursuant to an act of Congress, its construction shall be in compliance with the applicable Federal and State laws; during the period of construction, at least one-half the width of the road shall be kept open to travel; and, upon completion, the road or highway shall be restored to its original condition and all excavations shall be refilled. Whenever the line crosses a ravine, canyon, or waterway, it shall be laid below the bed thereof or upon such superstructure as will not interfere with the use of the surface.

(d) The size of the proposed pipeline must be shown in the application, on the maps, and in the engineer's affidavit and applicant's certificate. The application and maps shall specify whether the pipe is welded, screw-joint, dresser, or other type of coupling. Should the grantee of an approved right-of-way desire at any time to lay additional line or lines of pipe in the same trench, or to replace the original line with larger or smaller pipe, written permission must first be obtained from the Secretary and all damages to be sustained by the owners must be paid in advance in the amount fixed and determined by the Secretary.

(e) Applicants for oil or gas pipeline rights-of-way may apply for additional land for pumping stations or tank sites. The maps shall show clearly the location of all structures and the location of all lines connecting with the main line. Applicants for lands for pumping stations or tank sites shall execute and file a stipulation agreeing as follows:

(1) Upon abandonment of the right-of-way to level all dikes, fire-guards,

and excavations and to remove all concrete masonry foundations, bases, and structural works and to restore the land as nearly as may be possible to its original condition.

(2) That a grant for pumping station or tank site purposes shall be subservient to the owner's right to remove or authorize the removal of oil, gas, or other mineral deposits; and that the structures for pumping station or tank site will be removed or relocated if necessary to avoid interference with the exploration for or recovery of oil, gas, or other minerals.

(f) Purely lateral lines connecting with oil or gas wells on restricted lands may be constructed upon filing with the Secretary a copy of the written consent of the Indian owners and a blueprint copy of a map showing the location of the lateral. Such lateral lines may be of any diameter or length, but must be limited to those used solely for the transportation of oil or gas from a single tract of tribal or individually owned land to another lateral or to a branch of the main line.

(g) The applicant, by accepting a pipeline right-of-way, thereby agrees that the books and records of the applicant shall be open to inspection by the Secretary at all reasonable times, in order to obtain information pertaining in any way to oil or gas produced from tribal or individually owned lands or other lands under the jurisdiction of the Secretary.

§ 169.26 Telephone and telegraph lines; radio, television, and other communications facilities.

(a) The Act of February 15, 1901 (31 Stat. 790), as amended by the Act of March 4, 1940 (54 Stat. 41; 43 U.S.C. 959); the Act of March 4, 1911 (36 Stat. 1253), as amended by the Act of May 27, 1952 (66 Stat. 95; 43 U.S.C. 961); and the Act of March 3, 1901 (31 Stat. 1083; 25 U.S.C. 319), authorize right-of-way grants across tribal, individually owned, and Government-owned land for telephone and telegraph lines and offices, for poles and lines for communication purposes, and for radio, television, and other forms of communication transmitting, relay, and receiving structures and facilities. Rights-of-way granted under these acts shall be subject to the provisions of this section as well as other pertinent sections of this Part 169. Except when otherwise determined by the Secretary, rights-of-way granted for such purposes under the Act of February 5, 1948 (62 Stat. 17; 25 U.S.C. 323–328), shall also be subject to the provisions of this section.

(b) A right-of-way granted under the said Act of March 4, 1911, as amended, shall be limited to a term not exceeding 50 years from the date of the issuance of such grant.

(c) No right-of-way shall be granted for a width in excess of 50 feet on each side of the centerline, unless special requirements are clearly set forth in the application which fully justify a width in excess of 50 feet on each side of the centerline.

(d) Applicants engaged in the general telephone and telegraph business may apply for additional land for office sites. The maps showing the location of proposed office sites shall be filed separately from those showing the line of route, and shall be drawn to a scale of 50 feet to an inch. Such maps shall show enough of the line of route to indicate the position of the tract with reference thereto. The tract shall be located with respect to the public survey as provided in § 169.8, and all buildings or other structures shall be platted on a scale sufficiently large to show clearly their dimensions and relative positions.

(e) Rights-of-way for poles and lines for communication purposes, and for radio, television, and other forms of communication transmitting, relay, and receiving structures and facilities, shall be limited to 200 feet on each side of the centerline of such lines and poles; radio and television, and other forms of communication transmitting, relay, and receiving structures and facilities shall be limited to an area not to exceed 400 feet by 400 feet.

§ 169.27 Power projects.

(a) The Act of March 4, 1911 (36 Stat. 1253), as amended by the Act of May 27, 1952 (66 Stat. 95; 43 U.S.C. 961), authorizes right-of-way grants across tribal, individually owned and Government-owned land for electrical

poles and lines for the transmission and distribution of electrical power. Rights-of-way granted under that act shall be subject to the provisions of this section as well as other pertinent sections of this Part 169. Except when otherwise determined by the Secretary, rights-of-way granted for such purposes under the Act of February 5, 1948 (62 Stat. 17; 25 U.S.C. 323–328) shall also be subject to the provisions of this section.

(b) All applications, other than those exceeding power marketing agencies of the Department of the Interior, for authority to survey, locate, or commence construction work on any project for the generation of electric power, or the transmission or distribution of electrical power of 66 kV or higher involving Government-owned lands shall be referred to the Office of the Assistant Secretary of the Interior for Water and Power Resources or such other agency as may be designated for the area involved, for consideration of the relationship of the proposed project to the power development program of the United States. Where the proposed project will not conflict with the program of the United States, the Secretary, upon notification to the effect, may then proceed to act upon the application. In the case of necessary changes respecting the proposed location, construction, or utilization of the project in order to eliminate conflicts with the power development program of the United States, the Secretary shall obtain from the applicant written consent to or compliance with such requirements before taking further action on the application.

(c) A right-of-way granted under the said Act of March 4, 1911, as amended, shall be limited to a term not exceeding 50 years from the date of the issuance of such grant.

(d) Rights-of-way for power lines shall be limited to those widths which can be justified and in no event shall exceed a width of 200 feet on each side of the centerline.

(e) The applicant shall make provision, or bear the reasonable cost (as may be determined by the Secretary) of making provision, for avoiding inductive interference between any project transmission line or other project works constructed, operated, or maintained by it on the right-of-way authorized under the grant and any radio installation, telephone line, or other communication facilities now or hereafter constructed and operated by the United States or any agency thereof. This provision shall not relieve the applicant from any responsibility or requirement which may be imposed by other lawful authority for avoiding or eliminating inductive interference.

(f) An applicant for a right-of-way for a transmission line across Government-owned lands having a voltage of 66 kV or more must, in addition to the stipulation required by § 169.5, execute and file with its application a stipulation agreeing to accept the right-of-way grant subject to the following conditions:

(1) The applicant agrees that, in the event it becomes necessary for the United States to acquire the applicant's transmission line or facilities constructed on or across such right-of-way, the United States reserves the right to acquire such line or facilities at a sum to be determined upon by a representative of the applicant, a representative of the Secretary of the Interior, and a third representative to be selected by the other two for the purpose of determining the value of such property thus to be acquired by the United States.

(2) To allow the Department of the Interior to utilize for the transmission of electrical power any surplus capacity of the line in excess of the capacity needed by the holder of the grant for the transmission of electrical power in connection with the applicant's operations, or to increase the capacity of the line at the Department's expense and to utilize the increased capacity for the transmission of electrical power. Utilization by the Department of surplus or increased capacity shall be subject to the following terms and conditions:

(i) When the Department desires to utilize surplus capacity thought to exist in a line, notification will be given to the applicant and the applicant shall furnish to the Department within 30 days a certificate stating whether the line has any surplus ca-

pacity not needed by the applicant for the transmission of electrical power in connection with the applicant's operations, and, if so, the extent of such surplus capacity.

(ii) In order to utilize any surplus capacity certified by the applicant to be available, or any increased capacity provided by the Department at its own expense, the Department may interconnect its transmission facilities with the applicant's line in a manner conformable to approved standards of practice for the interconnection of transmission circuits.

(iii) The expense of interconnection will be borne by the Department, and the Department will at all times provide and maintain adequate switching, relaying, and protective equipment so as to insure that the normal and efficient operation of the applicant's line will not be impaired.

(iv) After any interconnection is completed, the applicant shall operate and maintain its line in good condition; and, except in emergencies, shall maintain in a closed position all connections under the applicant's control between the applicant's line and the interconnecting facilities provided by the Department.

(v) The interconnected power systems of the Department and the applicant will be operated in parallel.

(vi) The transmission of electrical power by the Department over the applicant's line will be effected in such manner and quantity as will not interfere unreasonably with the applicant's use and operation of the line in accordance with the applicant's normal operating standards, except that the Department shall have the exclusive right to utilize any increased capacity of the line which has been provided at the Department's expense.

(vii) The applicant will not be obligated to allow the transmission over its line by the Department of electrical power to any person receiving service from the applicant on the date of the filing of the application for a grant, other than persons entitled to statutory preference in connection with the distribution and sale of electrical power by the Department.

(viii) The Department will pay to the applicant an equitable share of the total monthly cost of maintaining and operating the part of the applicant's line utilized by the Department for the transmission of electrical power, the payment to be an amount in dollars representing the same proportion of the total monthly operation and maintenance cost of such part of the line as the maximum amount in kilowatts of the power transmitted on a scheduled basis by the Department over the applicant's line during the month bears to the total capacity in kilowatts of that part of the line. The total monthly cost may include interest and amortization, in accordance with the system of accounts prescribed by the Federal Power Commission, on the applicant's net total investment (exclusive of any investment by the Department) in the part of the line utilized by the Department.

(ix) If, at any time subsequent to a certification by the applicant that surplus capacity is available for utilization by the Department, the applicant needs for the transmission of electrical power in connection with its operations the whole or any part of the capacity of the line theretofore certified as being surplus to its needs, the applicant may modify or revoke the previous certification by giving the Secretary of the Interior 30 months' notice, in advance, of the applicant's intention in this respect. After the revocation of a certificate, the Department's utilization of the particular line will be limited to the increased capacity, if any, provided by the Department at its expense.

(x) If, during the existence of the grant, the applicant desires reciprocal accommodations for the transmission of electrical power over the interconnecting system of the Department to its line, such reciprocal accommodations will be accorded under terms and conditions similar to those prescribed in this paragraph with respect to the transmission by the Department of electrical power over the applicant's line.

(xi) The terms and conditions prescribed in this paragraph may be modified at any time by means of a supplemental agreement negotiated between the applicant and the Secretary of the Interior or his designee.

90-077 O - 82 - - - 28

(g) Applicants may apply for additional lands for generating plants and appurtenant facilities. The lands desired for such purposes may be indicated on the maps showing the definite location of the right-of-way, but separate maps must be filed therefor. Such maps shall show enough of the line of route to indicate the position of the tract with respect to said line. The tract shall be located with respect to the public survey as provided in [illegible] and all buildings or other structures shall be platted on a scale sufficiently large to show clearly their dimensions and relative positions.

[33 FR 19863, Dec. 27, 1968, as amended at 38 FR 14680, June 4, 1973. Redesignated at 47 FR 13327, Mar. 30, 1982]

§ 169.25 Public highways.

(a) The appropriate State or local authorities may apply under the regulations in this Part 169 for authority to open public highways across tribal and individually owned lands in accordance with State laws, as authorized by the Act of March 3, 1901 (31 Stat. 1084; 25 U.S.C. 311).

(b) In lieu of making application under the regulations in this Part 169, the appropriate State or local authorities in Nebraska or Montana may, upon compliance with the requirements of the Act of March 4, 1915 (38 Stat. 1188), lay out and open public highways in accordance with the respective laws of those States. Under the provisions of that act, the applicant must serve the Secretary with notice of intention to open the proposed road and must submit a map of definite location on tracing linen showing the width of the proposed road for the approval of the Secretary prior to the laying out and opening of the road.

(c) Applications for public highway rights-of-way over and across roadless and wild areas shall be considered in accordance with the regulations contained in Part 265 of this chapter.

PART 170—ROADS OF THE BUREAU OF INDIAN AFFAIRS

CONSTRUCTION AND MAINTENANCE OF ROADS

Sec.
170.1 Purpose.
170.2 Definitions.
170.3 Construction and improvement.
170.4 Approval of road construction activities.
170.4a Selection of road construction projects.
170.5 Right of way.
170.5a Employment of Indians.
170.6 Maintenance of Indian roads.
170.6a Contributions from tribes.
170.7 Cooperation with States.
170.8 Use of roads.
170.9 Roadless and wild areas.

PUBLIC HEARINGS ON ROAD PROJECTS

170.10 Purpose and objectives.
170.11 Criteria.
170.12 Need for public hearing determined.
170.13 Notice of road construction projects.
170.14 Notice of public hearing.
170.15 Record of hearing proceedings.
170.16 Conducting the public hearing.
170.17 Written statements.
170.18 Hearing statement.
170.19 Appeals.

CONSTRUCTION AND MAINTENANCE OF ROADS

AUTHORITY: 36 Stat. 861; 78 Stat. 241, 253, 257; 45 Stat. 750 (25 U.S.C. 47; 42 U.S.C. 2000c(b), 2000c-2(i); 23 U.S.C. 101(a), 208, 308), unless otherwise noted.

SOURCE: Sections 170.1 to 170.9, 39 FR 27132, July 25, 1974, unless otherwise noted. Redesignated at 47 FR 13327, Mar. 30, 1982.

§ 170.1 Purpose.

The regulations in this part govern the planning, design, construction, maintenance and general administration of certain Indian reservation roads and bridges.

§ 170.2 Definitions.

As used in this part:

(a) "Commissioner" means the Commissioner of Indian Affairs.

(b) "Superintendent" means the Agency Superintendent at all locations, with the exception that at the Navajo Reservation this term shall mean the Area Director or his designated representative for public hear-

Office - Supreme Court, U.S
FILED
JUL 12 1983
ALEXANDER L. STEVAS
CLERK

83-180

NO. _____

IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM 1983

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Petitioner

vs.

JAMES G. WATT, et al., and WALKER RIVER
PAIUTE TRIBE OF NEVADA,
Respondents

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

REPRODUCTION OF PORTIONS OF APPENDIX TO PETITION FOR WRIT OF CERTIORARI

FOLEY, MC INTOSH & FOLEY
PROFESSIONAL CORPORATION
By ROBERT J. FOLEY
(counsel for service)
By WILLIAM R. FOLEY
1225 Solano Avenue
Albany, CA 94706
Telephone (415) 524-4123

ECHEVERRIA AND OSBORNE,
CHARTERED
By PETER ECHEVERRIA
By NATHAN M. JENKINS
555 South Center Street
Reno, Nevada 89501

Attorneys for Petitioner

TABLE OF CONTENTS

NOTE:

THE ENTIRE APPENDICES ARE INCLUDED IN THE PETITION FOR WRIT OF CERTIORARI PREVIOUSLY FILED HEREIN. ONLY THE FOLLOWING PORTIONS THEREOF HAVE BEEN REPRODUCED HERE. PAGE NUMBERS HAVE BEEN RETAINED TO CORRESPOND TO THE ORIGINALS.

	Page
APPENDIX A.1.	
Decision of the United States Court of Appeals, Ninth Circuit, decided 1 March 1983, published at 700 F.2d 550 (1983)	i
APPENDIX B.2.	
Decision of the Assistant Secretary of the Interior for Indian Affairs, dated 19 June 1978	iii
APPENDIX B.3.	
Summary Judgment, entered 14 August 1980, by the United States District Court, District of Nevada, to which is appended Order Granting Summary Judgment, entered 25 July 1980.	iv

APPENDIX B.4.

Amended Summary Judgment, entered 28 August 1980, by the United States District Court, District of Nevada v

APPENDIX A

1. Decision of the United States Court of Appeals, Ninth Circuit, decided 1 March 1983, published at 700 F.2d 550 (1983).

SOUTHERN PACIFIC TRANSPORTATION COMPANY
Plaintiff-Appellee,

v.

James G. WATT, Secretary of the Interior, et al., Defendant-Appellant,

and

Walker River Paiute Tribe of Nevada
Defendant-Intervenor-Appellant.

Nos. 80-4505, 80-4506.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Jan. 14, 1982.

Decided March 1, 1983.

Railroad sought review of administrative denial of its application for railroad, telephone and telegraph right-of-way across tribal lands for lack of tribal consent to right-of-way. The United States District Court for the District of Nevada, Bruce R. Thompson, J., granted summary judgment for railroad,

and tribe and Secretary of the Interior appealed. The Court of Appeals, Canby, Circuit Judge, held that Secretary acted within his power in requiring by regulation that tribal consent be obtained for acquisition of right-of-way.

Reversed and remanded.

1. Indians - 10

Statute which grants right-of-way for railway, telegraph and telephone line through any Indian reservation to any railroad which complies with applicable statutory provisions and rules and regulations was intended fully to protect Indian interests and must be liberally construed in favor of Indians. 25 U.S.C.A. §§312-318.

2. Indians - 15(2)

Under statute which grants right-of-way for any railway, telegraph and

telephone line through any Indian reservation to any railroad which complies with statutory provisions and rules and regulations, Secretary of the Interior acted within his power in requiring by regulation that tribal consent be obtained for acquisition of right-of-way by railroad. 25 U.S.C.A. §§312-318.

3. Indians - 10

Statute which grants right-of-way for railway, telegraph and telephone lines through any Indian reservation to any railroad that complies with statutory provisions and rules and regulations does not constitute grant to railroad companies of power of eminent domain since statute contains no express grant of power of eminent domain nor is it necessary to imply

such a grant to make statute effective. 25 U.S.C.A. §§312-318.

4. Public Lands - 71

Once grant in praesenti, which was judicially created to establish priorities among rival private claimants to federal lands, is approved by designated government official, it relates back to date grantee commenced proceedings to obtain title and cuts off all claimants whose rights were initiated later but relation back of title applies only as against other intervening claimants and, as against United States, no vested right arises until requirements are met, and grant has been approved by designated official.

5. Constitutional Law - 62(5)

Indians - 15(1)

Congress may vest in administrative official the authority to establish discretionary conditions with which prospective grantees must comply in order to make grants effective and trigger relation back of title, and congress did exactly that in statute which grants right-of-way for railway, telegraph and telephone line through any Indian reservation to any railroad which complies with statutory provisions and rules and regulations promulgated thereunder. U.S.C.A. §§312-318.

6. Constitutional Law - 63(1)

Subdelegation of administrative authority to an Indian tribe is analogous to subdelegation to state or local government, which is not per se

improper, and such a subdelegation need not rest on express statutory authority.

7. Indians - 15(2)

Secretary of the Interior's regulation requiring that tribal consent be obtained for acquisition of right-of-way was not abdication of Secretary's power to administer statute which grants right-of-way for railway, telegraph and telephone line through any Indian reservation to any railroad that complies with statutory provisions and rules and regulations prescribed thereunder but, rather, constituted effort by Secretary to incorporate into decision-making process the wishes of a body with independent authority over affected lands, and

thus redelegation was proper. 25 U.S.C.A. §§312-318.

Laura Frossard, Atty., Dept. of Justice, Washington, D.C., Yvonne T. Knight, Native Americans Rights Fund, Boulder, Colo., for Watt.

Nathan Jenkins, Reno, Nev., William R. Foley, Robert J. Foley, Foley, McIntosh & Foley, Albany, Cal., for Southern Pacific.

James McCartney, Houston, Tex., for amicus curiae Transwestern Pipeline Co.

Appeal from the United States District Court for the District of Nevada.

Before FLETCHER, POOLE and CANBY, Circuit Judges.

CANBY, Circuit Judge:

The Walker River Paiute Tribe of Nevada (Tribe) and the Secretary of the Interior (Secretary) appeal from the district court's grant of summary judgment in favor of Southern Pacific Transportation Company (Southern Pacific). The district court held that tribal consent is not a condition precedent to the filing and processing of an application for a right-of-way across tribal lands under the Act of March 2, 1899, ch. 374, 30 Stat. 990 (codified at, 25 U.S.C. §§312-318 (1976) (1899 Act or Act). We disagree and reverse the grant of summary judgment in favor of Southern Pacific.

I. Facts

The relevant facts are undisputed. Since 1882 Southern Pacific and its predecessors have operated a railway

and adjoining telephone and telegraph lines over lands within the Walker River Indian Reservation. In 1976, this court held that Southern Pacific "does not have and has never had a valid right-of-way across lands within the original 1874 executive order boundaries of the Walker River Reservation except through the lands ceded by the Tribe to the United States in 1906". United States v. Southern Pacific Transpor., 543 F.2d 676, 699 (9th Cir. 1976)(Southern Pacific I). As a result, on April 28, 1977, Southern Pacific filed an application with the Western Nevada Agency of the Bureau of Indian Affairs for a railroad, telephone and telegraph right-of-way through 10.89 miles of tribal lands within the Walker River Indian Reservation.

Southern Pacific sought the right-of-way under the provisions of the 1899 Act. On May 4, 1977, the Agency Superintendent rejected the application without filing it, because it did not include evidence that the Tribe had consented to the right-of-way. Southern Pacific appealed the Agency Superintendent's decision within the agency, and the decision was upheld at all administrative levels.

Southern Pacific sought review of the agency action in federal district court. The Tribe intervened as a party-defendant. After cross motions for summary judgment, the district court entered judgment in favor of Southern Pacific. This appeal followed.

II. Discussion

We must determine whether Congress has authorized the Secretary to impose

a condition of tribal consent on an application for a right-of-way under the 1899 Act. The Secretary and the Tribe contend that the 1899 Act itself vests in the Secretary the authority to impose conditions, including tribal consent, on railroad rights-of-way across Indian tribal lands. They argue that the district court erred in characterizing the 1899 Act as an eminent domain statute and a grant in praesenti. The Tribe argues in the alternative that even if the 1899 Act is a grant in praesenti, that fact would not preclude the Secretary from establishing conditions with which prospective grantees must comply before a grant becomes effective. We conclude that the 1899 Act is not an eminent domain statute. We further

conclude that the 1899 Act - whether a grant in praesenti or not - authorizes the Secretary to establish, by regulation, grant preconditions, including one of tribal consent. The Secretary has exercised that authority and promulgated a regulation providing that "[n]o right-of-way shall be granted over and across any tribal land . . . without the prior consent of the tribe." 25 C.F.R. §161.3(a) (1981). We reject Southern Pacific's contention that the regulation constitutes an unlawful redelegation of the Secretary's authority.

[1] In interpreting the 1899 Act, we are guided by our earlier determination in this case that the Act was intended fully to protect Indian interests. Southern Pacific I,

543 F.2d at 692; see H.R.Rep. No. 1896, 55th Cong., 3d Sess. 2 (1899). It must therefore be liberally construed in favor of the Indians. Id.; see Bryan v. Itasca County, 426 U.S. 373, 392, 96 S.Ct. 2102, 2112, 48 L.Ed.2d 710 (1976). We must also bear in mind that the construction of a statute rendered by the agency charged with its administration is ordinarily entitled to substantial deference. United States v. Rutherford, 442 U.S. 544, 553, 99 S.Ct. 2470, 2475, 61 L.Ed.2d 68 (1979); Udall v. Tallman, 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616 (1965); Central Lincoln Peoples' Utility Dist. v. Johnson, 673 F.2d 1076, 1078 (9th Cir.1982); Adams v. Howerton, 673 F.2d 1036, 1040 (9th Cir.), cert. denied, _____ U.S. ____,

102 S.Ct. 3494, 73 L.Ed.2d 1373 (1982). Our review is limited to determining whether the Secretary's interpretation is reasonable. Central Lincoln, 673 F.2d at 1078; Columbia Basin Land Protection Assoc'n v. Schlesinger, 643 F.2d 585, 600 (9th Cir.1981).

A. The 1899 Act

[2] The 1899 Act provides in part:

> A right of way for a railway, telegraph and telephone line through any Indian reservation . . . is granted to any railroad company organized under the laws of the United States, or of any State or Territory, which shall comply with the provisions of sections 312-318 of [the 1899 Act] and such rules and regulations as may be prescribed thereunder. 15 U.S.C. §312

(1976) Provisos follow that establish certain conditions that the Secretary must assure have been fulfilled. The district court held that the 1899 Act grants to a railroad the power of eminent domain to condemn rights-of-way through Indian reservations and that "[t]he concept of tribal consent as a pre-condition to the grant of a right-of-way is the very antihesis of the exercise of the power of eminent domain." The district court also held the 1899 Act to be a grant in praesenti subject to the performance of conditions precedent and conditions subsequent. Therefore, in the district court's view, the Act does not vest in the Secretary authority to establish grant preconditions beyond those contained in the statute but rather expressly

specifies the conditions the Secretary must find to be satisfied prior to approving an application. The Secretary and the Tribe challenge the district court's determination that the 1899 Act is a grant of the power of eminent domain and a grant in praesenti. They argue that Section 312 of the Act delegates to the Secretary authority to promulgate legislative rules and, thereby, the authority to establish grant preconditions by regulation. We conclude that the interpretation advanced by the Secretary and the Tribe is both reasonable and in accord with our obligation to construe the 1899 Act liberally in the Tribe's favor. Having concluded that the interpretation advanced by the Secretary of Interior, the head of the agency

charged with administration of the 1899 Act, is reasonable, we need not inquire further into the meaning of the provisions of the Act. "[W]e need not find that [the Secretary's] construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings." Udall v. Tallman, supra, 380 U.S. at 16, 85 S.Ct. at 801, quoting Unemployment Compensation Comm'n of Alaska v. Aragon, 329 U.S. 143, 67 S.Ct. 245, 91 L.Ed 136 (1946). It is enough that the Secretary's interpretation is reasonable, and there are several grounds for concluding that it is.

The plain language of the Act supports the interpretation of the

Secretary and the Tribe. Section 1 provides that a right-of-way "is granted" to a railroad company that complies "with the provisions of sections 312-318 of this title [the 1899 Act] and such rules and regulations as may be prescribed thereunder . . . ." 25 U.S.C. §312 (1976) (emphasis added). Thus, section 1 may be read to establish two sources of conditions precedent: the statutory provisions and the Secretary's regulations. That reading of section 1 is reinforced by the fact that section 7 directs the Secretary to "make all needful rules and regulations, not inconsistent with sections 312-318 of this title, for the proper execution and carrying into effect of all the provisions of said sections." Id. at §317. The grant of

rule-making authority in section 1 would be superfluous if it did not confer authority to promulgate requirements, beyond those specified in the Act. Furthermore, the use of the phrase "rules and regulations, not inconsistent with sections 312-318 of this title" (emphasis added) in section 7 (§317) rather than such a phrase as "rules and regulations, in furtherance of the provision of sections 312-318 of this title" supports a broad interpretation of the grant of rule-making authority.

Nothing in the legislative history of the 1899 Act suggests that the interpretation urged by the Secretary and the Tribe is unreasonable. That history is silent on the question of the scope of the authority vested in

the Secretary by the Act. See H.R.Rep. 1896, 55th Cong. 3d Sess. 1-2 (1899); 32 Cong. Rec. 1753-55, 1849, 2041-42, 2471-72 (1899).

The construction we approve here is also consistent with the 1948 General Rights-of-Way Act, Pub.L. No. 80-407, 62 Stat. 17 (codified in 25 U.S.C. §§323-328 (1976) (1948 Act), which provides that "[n]o grant of a right-of-way over and across any lands belonging to a tribe organized under [the Indian Reorganization Act of 1934][1] . . . shall be made without the consent of the proper tribal officials." 25 U.S.C. §324 (1976). We recognize

---

1. The Walker River Paiute Tribe of Nevada is the governing body of the Walker River Indian Reservation. The Tribe is organized pursuant to section 16 of the Indian Reorganization Act, Pub.L. No. 73-383, 48 Stat. 984, 987 (1934) (codified in 25 U.S.C. §476 (1976).

that interpretation of the 1899 Act must rest primarily on its own language and legislative history. Nevertheless, the 1899 Act and the 1948 Act both pertain to rights-of-way across Indian lands and share a common purpose: the preservation and protection of Indian interests. The Supreme Court has expressly approved the construction of statutes affecting reservation Indians in light of intervening legislation. Bryan v. Itasca County, supra, 426 U.S. at 386, 96 S.Ct. at 2109; see Moe v. Salish & Kootenai Tribes, 425 U.S. 463, 472-75, 96 S.Ct. 1634, 1640-42, 48 L.Ed.2d 96 (1976). Furthermore, the legislative history of the 1948 Act suggests that the drafters of that Act believed that, at least after adoption of the 1948 Act, no right-of-

way across lands of a tribe organized under the 1934 Act could be granted without tribal consent. See S.Rep. No. 823, 80th Cong., 2d Sess., reprinted in [1948] U.S. Code Cong. & Ad.News 1033, 1036. See also Escondido Mutual Water Co. v. Federal Energy Regulatory Comm'n, 692 F.2d 1223, 1232 (9th Cir. 1982).

B. Grant of Eminent Domain Power

[3] In reaching the conclusion that the 1899 Act vests in the Secretary authority to require tribal consent priot to processing of a right-of-way application, we necessarily reject characterization of the 1899 Act as a grant to railroad companies of the power of eminent domain. "Eminent domain is the power of the sovereign

to take property for public use without the owner's consent." 1. J. Sackman, Nichols' The Law of Eminent Domain, §1.11, at 1-7 (3d ed. 1981). It is well settled that the power of eminent domain may be delegated by Congress to a private corporation. Custiss v. Georgetown & Alexandria Turnpike Co., 10 U.S. (6 Cranch) 232, 3 L.Ed. 209 (1810)(Marshall, C.J.); 1 Nichols, supra at §3.23, at 3-212. A grant of the power, however, must be conferred "in express terms or by necessary implication." Western Union Tel. Co. v. Penn R.R. Co., 195 U.S. 540, 564-69, 25 S.Ct. 133, 49 L.Ed. 312 (1904); 1 Nichols, supra, at §3.21[4], at 3-60; accord, 3 C. Sands, Sutherland Statutory Construction §64.06, at 128 (4th ed. 1974).

Comparison of the 1899 Act with contemporaneous acts held to be eminent domain statutes reveals that the 1899 Act does not contain the language characteristic of a grant of the power of eminent domain. The Act of February 18, 1888, ch. 13, 25 Stat. 35 (held to be a grant of the power of eminent domain in Noble v. Oklahoma City, 297 U.S. 481, 490 56 S.Ct. 562, 566, 80 L.Ed. 816 (1936), and the Act of March 3, 1899, ch. 453, 30 Stat. 1368 (held to be a grant of the power of eminent domain in United States v. Ft. Smith & W.R. Co., 195 F.211, 212 (8th Cir.1912), both provide that a named railroad is "invested and empowered with the right of locating, constructing, owning, equipping, operating, using, and maintaining a railway" and "is author-

ized to take and use" a right-of-way for railway purposes and "to take and use" land for station purposes. Nowhere in the 1899 Act is there language conferring on a railroad the right to condemn or the right to take and use. The operative language of the 1899 Act is the phrase "is granted" which imports not a delegation of the power of eminent domain but rather a direct conveyance, conditioned or not, by Congress or an administrative agency. Thus, the 1899 Act contains no express grant of the power of eminent domain; nor is it necessary to imply such a grant to make the Act effective.

We therefore conclude that the district court erred in holding that

the 1899 Act was a grant of the power of eminent domain.[2]

---

2. In so holding, we reject two statements of other courts of appeal characterizing the 1899 Act as a grant of eminent domain. See United States v. Ft. Smith & W.R. Co., 195 F.211, 214 (8th Cir.1912); Clarke v. Boysen, 39 F.2d 800, 814 (10th Cir.), cert. denied, 282 U.S. 869, 51 S.Ct. 75, 75 L.Ed. 768 (1930). Those statements, relied on by the district court here, were neither well considered nor necessary to the decisions in which they appeared. Ft. Smith arose under a different statute (also passed in 1899(, and Clarke, in its relevant portions, concerned the question whether the 1899 Act applied to reservation lands previously ceded to the United States.

   The district court in the present case also relied on provisions for determining compensation for rights-of-way in the absence of consent, in section 3 of the 1899 Act, 25 U.S.C. §314 (1976), as well as a footnote in Cohen's Handbook of Indian Law referring to the right of railway companies to condemn Indian land. F. Cohen, Handbook of Federal Indian Law 95 n. 76 (1942). Both of these references are to acquisition of rights-of-way over individually allotted lands, not tribal lands such as those involved in the present dispute. The two are not inevitably treated the same. See Yellowfish v. Stillwater, 691 F.2d 926 (10th Cir. 1982).

C. Grant In Praesenti

[4] The district court also held that the 1899 Act was a grant in praesenti. We find it unnecessary to resolve that question.[3] The doctrine of in praesenti

---

3. We disagree with the district court's reading of our prior decision, Southern Pacific I, supra, as "impliedly recognizing that the [1899] Act is a grant in praesenti of a right-of-way . . . ." In Southern Pacific I we did not reach the question whether the 1899 Act is a grant in praesenti. We did point out that the granting clause of the 1899 Act differed significantly from that of the 1875 Act, a statute previously held to be a grant in praesenti. 543 F.2d at 691. We further noted that to qualify as a grantee under the 1899 Act, a railroad must comply with requirements not found in the 1875 Act. Id. We then held that Southern Pacific's predecessors did not comply with the compensation requirement of the 1899 Act and, therefore, failed to acquire a right-of-way under that Act. Id. at 692-93. To reach that result in Southern Pacific I, it was unnecessary for us to decide whether the additional requirements contained in the 1899 Act were consistent with the characteristics of a grant in praesenti.

grants was judicially created to establish priorities among rival private claimants to federal lands. A grant in praesenti "imports the transfer . . . of a present interest in the lands designated" by the act. Van Wyck v. Knevals, 106 U.S. 360, 365, 1 S.Ct. 336, 337, 27 L.Ed. 201 (1882). The words "is hereby granted" are characteristic of an in praesenti grant. Noble v. Oklahoma City, supra, 297 U.S. at 490-91, 56 S.Ct. at 566. Once the grant is approved by the designated government official, it "relates back to the initiatory right [the date the grantee commenced proceedings to obtain title], and cuts off all claimants whose rights were initiated later." Stalker v. Oregon Shortline R.R., 225 U.S. 142, 149, 32 S.Ct. 636, 638, 56

L.Ed. 1027 (1912); accord, Van Wyck v. Knevals, 106 U.S. at 365, 1 S.Ct. at 337. The relation back of title applies only as against other intervening claimants. As against the grantor United States, no vested right arises until the requirements are met and the grant has been approved by the designated official. Stalker v.Oregon Shortline R.R., 225 U.S. at 149, 32 S.Ct. at 638; Shepley v. Cowan, 91 U.S. 330, 338, 23 L.Ed. 424 (1876).

[5] Nothing in this scheme of in praesenti grants, nor in its purpose of protecting grantees against intervening private claims, necessarily limits the right of the grantor United States to condition the grant. It is true that in the typical in praesenti grant, the determination of the Secre-

tary that the grantee has complied with the conditions of the grant is a ministerial function. Neither authority nor logic requires that this be the case, however. We have been shown no sufficient reason to conclude that Congress is unable to vest in an administrative official the authority to establish discretionary conditions with which prospective grantees must comply in order to make the grants effective and trigger the relation back of title. Our examination of section 312 convinces us that Congress has done exactly that. Congress' action is effective whether or not the Act provides for grants in praesenti. That is all we need to decide about the meaning of the Act.

D. Redelegation of the Secretary's Authority.

Southern Pacific contends that if the 1899 Act is construed to authorize the Secretary to establish conditions precedent to the grant of a right-of-way under that Act, the Secretary, by requiring tribal consent under 25 C.F.R. §161.3(a)(1981), has improperly redelegated that decisional authority to the Indian tribes. We conclude that the challenged redelegation is permissible.

[6] Subdelegation of administrative authority to an Indian tribe is analogous to subdelegation to a state or local government. "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory

. . .; they are 'a separate people' possessing 'the power of regulating their internal and social relations . . . .'" United States v. Mazurie, 419 U.S. 544, 557, 95 S.Ct. 710, 717, 42 L.Ed.2d 706, 716-17 (1975) (citations omitted). Subdelegation of administrative authority to a sovereign entity is not per se improper. Id.; see United States v. Matherson, 367 F.Supp. 779, 781-83 (E.D.N.Y. 1973)(upholding regulation issued by Superintendent of Fire Island National Seashore requiring persons seeking to operate motor vehicles on certain national seashore lands to secure first a permit from the local municipality), aff'd mem., 493 F.2d 1399 (2d Cir. 1974). Nor must such a subdelegation rest on

express statutory authority. See Fleming v. Mohawk Wrecking & Lumber Co., 331 U.S. 111, 120-22, 67 S.Ct. 1129, 1134, 91 L.Ed. 1375 (1947); Tabor v. Joint Bd. for Enrollment of Actuaries, 566 F.2d 705, 708 n. 5 (D.Cir.1977).

[7] The regulation at issue is not an abdication of the Secretary's power to administer the 1899 Act but rather an effort by the Secretary to incorporate into the decision-making process the wishes of a body with independent authority over the affected lands. The regulation does not relinquish to a tribe the final authority to approve; it delegates a power to disapprove. Cf. United States v. Matherson, 367 F.Supp. at 783 (Superintendent retains ultimate authority to approve permit). Moreover,

while the local jurisdiction in Matherson had no source of power separate from the regulation to control the use of national seashore lands, a tribe has independent authority to regulate the use of its own lands. The Supreme Court has stated that the limitations on Congressional delegation of legislative power are "less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter." United States v. Mazurie, 419 U.S. at 556-57, 95 S.Ct. at 717 (citation omitted). Applying that principle to the redelegation of legislative authority by an administrative body, we conclude that the redelegation embodies in 25 C.F.R. §161.3 is not improper.

III. Conclusion

The Secretary acted within his power in requiring by regulation that tribal consent be obtained for the acquisition of rights-of-way pursuant to the 1899 Act, 25 U.S.C. §312 (1976). The summary judgment in favor of Southern Pacific is reversed and the case is remanded to the district court for further proceedings consistent with this opinion.

REVERSED AND REMANDED

APPENDIX B

2. Decision of the Assistant Secretary of the Interior for Indian Affairs, dated 19 June 1978.

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

June 19, 1978

CERTIFIED-RETURN RECEIPT REQUESTED

Echeverria & Osborne, Chartered
555 South Center Street
Reno, Nevada 89501

Mr. Larry W. Telford
One Market Plaza
San Francisco, California 94105

Gentlemen:

This is an appeal by the Southern Pacific Transportation Company, through its attorneys, from a decision of the Assistant Area Director of the Phoenix Area Office affirming the decision of the Superintendent, Western Nevada Agency, to reject for filing, Southern Pacific's application for a railroad right-of-way across tribal lands of the Walker River Reservation. A

request was made on behalf of the appellant that the matter be referred to an Administrative Law Judge to conduct an evidentiary hearing. This request has been taken into consideration and rejected. The decision is therefore based on the written briefs of the appellee and the appellant.

A review of the file indicates the following relevant facts. The Southern Pacific Transportation Company (hereinafter "appellant") filed an application on April 28, 1977, for a railroad, telephone and telegraph right-of-way under the Act of March 2, 1899 (25 U.S.C. §312, et seq.). The application is for a 60-foot width, 10.89 miles in length, across tribally-owned land. On May 4, 1977, the Agency Superintendent returned the

application as being incomplete without written evidence of tribal approval. He recommended, at that time, ". . . that negotiations between you and the tribe be finalized before approval action can be considered on your application."

On May 27, 1977, the Acting Superintendent sent appellant a second letter outlining the contents of a properly filed application. In so doing, the Acting Superintendent specified that the application should be submitted under the Act of February 5, 1948 (25 U.S.C. 323), and that, among other things, the application ". . . must have the tribe's concurrence in the form of a tribal resolution." The Superintendent also indicated that the application for telephone and

telegraph lines should be submitted separately.

On May 27, appellant filed an appeal with the Area Director. On December 12, 1977, the Assistant Area Director, acting on the advice of the Portland Regional Solicitor, affirmed the agency's decision to return the application. The Area Director concentrated on the issue of whether appellant needed to show evidence of tribal consent in presenting its application. In so doing, the Area Director stated that the Secretary has the authority to require appellant to apply under the 1948 Act, but regardless of which act applied, tribal consent is a matter of statutory law and congressional policy. Therefore, waiver of the consent requirement would constitute

an abuse of the Secretary's discretion. The current appeal is from the Area Director's decision.

In its argument, appellant has argued that it is entitled to file its application under the 1899 Act, and that requiring tribal consent is inconsistent with the terms of the 1899 Act. Appellant argues that the 1899 Act provides for an in praesenti grant and that requiring tribal consent cannot therefore be imposed afterwards as a condition of such a grant. Alternatively, the appellant argues that applying the 25 CFR 161.3 consent requirement to applications filed pursuant to the 1899 Act is a denial of due process because the regulations do not make it clear that 161.3 is a pertinent section, applicable to

applications under the 1899 Act. Finally, appellant has argued that given the history of the United States' actions toward appellant and its predecessor in interest, the Assistant Secretary should in this case exercise his discretion to waive the consent requirement. Alternatively, because of such behavior, the Assistant Secretary is estopped from applying the consent requirement.

Consent Requirement

We conclude that it is immaterial whether the subject application is filed pursuant to the 1948 or the 1899 Acts, since Congress has made it clear that the consent of tribes organized under the 1934 Indian Reorganization Act is essential before the United States can alienate interests in their

trust lands. The Walker River Tribe is an IRA tribe. This requirement flows from 25 U.S.C. §476, which guarantees IRA tribes the power to prevent the sale, disposition, lease or encumbrance of tribal lands, interest in lands, or other tribal assets without the consent of the tribe. In other words, the consent requirement is not, in our view, an attribute of the Secretary's power or discretion but is a statutory element of a tribe's sovereign power which the Secretary does not have the discretion to waive.

Indeed, the 1948 Right-of-Way Act specifically bars the Secretary's ability to abrogate a tribe's prerogative in such matters. "No grant of a right-of-way over and across any lands belonging to a tribe organized under

sections 461-473 and 474-479 of this title; . . . shall be made without the consent of the proper tribal officials." 25 U.S.C. §324. (See also 1948 U.S. Code Cong. Service, p. 1033).

That Congress fully understood and intended such a policy is clear from the 1969 report of the House Committee on Government Operations (H. Rep. 91-78, 91st Cong. 1st Sess.), concerning this Department's revised right-of-way regulations which would have allowed the Secretary to waive the consent requirement in the case of non-IRA tribes.

> "We believe the Department's obligation to protect the rights of the Indian tribes should be concluded in regulations which clearly and emphatically preclude

any possible misuse of right-of-way grants to alienate Indian land without the consent of the Indians or to evade the maximum terms of years fixed in the acts of Congress authorizing land leasing.

For all of these reasons, it would appear best to retain the present Section 161.3 without any change, and to announce unambiguously that your Department intends to observe its own regulations."

(Letter to the Secretary of the Interior from Chairman, Natural Resources and Power Subcommittee, February 16, 1968.)

Appellant argues that since 25 U.S.C. §326 preserves the Secretary's authority under prior right-of-way statutes, the Secretary has continuing

authority under the 1899 Act to grant rights-of-way without regard to the consent requirement of §324. We reject such an interpretation of §326. The legislative history states that the purpose of the §326 provision was to ". . . avoid any possible confusion which may arise, particularly in the period of transition from the old system to the new . . . ." That counters the inference that §326 was intended to maintain separate procedures immune from the consent requirement of the 1948 Act.

Also, §326 must be read together with other sections of the same Act. While §325 evidences Congress' awareness of continuing authority under other statutes to grant rights-of-way, §324 categorically and unequivocally states

that "no right-of-way" shall be granted without tribal consent. Thus, the language of §324 embraces rights-of-way granted under §326. Furthermore, the precise language of §326 creates an important distinction. It states that the Federal Water Power Act is neither repealed nor amended by the 1948 Act; but, it merely states that prior right-of-way statutes are not repealed. In other words, its imposition of the §324 consent requirement can be construed as a quasi-amendment of the 1899 Right-of-Way Act, such an amendment is not barred by §326. We do not think that either the language of §326, or its legislative history, warrant an abridgment of the application of §324 to all rights-of-way granted after 1948.

Due Process:

We also conclude that, contrary to appellant's assertions, 25 CFR 161.3 and 25 CFR 161.23 make it clear that tribal consent must be obtained before any right-of-way can be granted. Therefore, appellant is not denied procedural due process. 25 CFR 161.23, the section applying to applications filed under the 1899 Act, provides that such applications shall also be subject to " . . . other pertinent sections of this Part 161." Because the consent requirement in 161.3 is so all-inclusive, "(a" No right-of-way shall be granted over and across any tribal land . . .," we do not see any room for question but that such a requirement is pertinent. Also, 161.15, the provision concerning

action on applications, states that the grant of a right-of-way shall be evidenced in a conveyancing instrument which incorporates the conditions or restrictions set out in the required consent. Moreover, 161.14 requires that the consideration and damage deposit filed with the applications shall in no event be less than the amount specified in the consent. In other words, the consent requirement is pervasive in the Part 161 application scheme.

Estoppel

Finally, appellant argues that the Assistant Secretary ought to exercise his discretion to waive the consent requirement because of the Department's past approval of the right-of-way. They also argue that

the Secretary is estopped from applying it because of such past behavior. As already stated, the Secretary does not have discretion to waive the requirement. Under the 1934 and the 1948 Acts, such an action would, in our view, infringe upon tribal sovereignty.

Moreover, estoppel is not applicable to the situation at hand. The case of United States v. Wharton, 514 F.2d 406 (C.A. 9 1975), cited by appellants, concerned title to public lands. The lands involved here are not public but are held in trust for the tribe. Moreover, the Wharton decision placed emphasis on the facts that not applying estoppel would work a fundamental unfairness to the injured party but applying it against the United States would not unduly harm the public

interest. Such is not the case here. Requiring the appellant to acquire tribal consent to its right-of-way application will not cause fundamental unfairness, as the divesting of title to land would have in the Wharton case. Moreover, the public interest, namely the tribe's sovereignty and ability to control its lands, would be unduly harmed were the consent requirement dropped in favor of the appellant. The compensation figure is to be negotiated and stated in the tribal consent. The tribe is the direct beneficiary of such compensation. Appellant essentially asks us to shift the burden of past government actions to the tribe's profound disadvantage -the loss of control over their lands and the inability to participate in

the determination of how much they should be compensated for such use.

In addition, several cases cited in the Wharton decision indicate that courts are less likely to apply estoppel against the government in matters of legislative significance, as opposed to purely administrative matters (e.g., the interpretations of Department regulations). Shuster v. C.I.R.., 312 F.2d 311 (C.A. 9 1962). Appellant asks that estoppel be applied to prevent the federal statutory consent requirement from being applied to them. We do not see that past unauthorized Department approval of a right-of-way is adequate grounds for estopping the application a current federal requirement. Indeed, if estoppel did not bar the United States from obtain-

ing a federal appellate decision that appellant did not have a valid right-of-way and is a trespasser until such time as it acquires one, we see no basis for applying estoppel to prevent the Department from requiring an applicant to adhere to federal statutory standards in filing an application.

The Area Director's decision also discussed the requirement under the 1899 Act that any deposit tendered upon application to the Secretary must be for the amount determined by the Secretary to be correct. Also, the 1899 Act requires that the application stipulate that passenger terminals be provided. We think that these points can be worked out in conjuntion with the agency when appellant submits its amended right-of-way application.

It is our conclusion that the Assistant Secretary cannot grant a right-of-way across the lands of a tribe which is subject to the provisions of the Indian Reorganization Act, without written evidence in the application of tribal consent--whether such application be submitted under the 1948 or the 1899 Act.

Accordingly, the decision of the Assistant Area Director dated December 12, 1977, is hereby affirmed. This decision, having been made in the capacity of Assistant Secretary is final for the Department and not subject to the provisions of 25 CFR 2.19(c).

Sincerely,

/s/ Forrest J. Gerard

Assistant Secretary -

Indian Affairs

APPENDIX B

3. Summary Judgment, entered 14 August 1980, by the United States District Court, District of Nevada, to which is appended Order Granting Summary Judgment, entered 25 July 1980.

FILED
AUGUST 14, 1980

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

SOUTHERN PACIFIC TRANS-
PORTATION COMPANY,

Plaintiff, CIVIL NO.
R-78-0216 BRT

-vs-

CECIL D. ANDRUS, et al.,

Defendants.

and SUMMARY JUDGMENT

WALKER RIVER PAIUTE TRIBE
OF NEVADA,

Defendant-Intervenor./

Cross Motions for summary judgment have been filed herein by Plaintiff, SOUTHERN PACIFIC TRANSPORTATION COMPANY, and by Defendant, CECIL D. ANDRUS, the Secretary of the Interior (which Motion was joined in by Defendant-

Intervenor, the WALKER RIVER PAIUTE TRIBE OF NEVADA).

The Motions have been thoroughly and extensively briefed by the parties and all parties have participated in oral argument.

The Court having carefully considered the arguments and authorities submitted in support of, and in opposition to the Motions, and being fully advised in the matter, has heretofore denied the Motion for summary judgment filed by the Secretary of the Interior and joined in by Interventor, and has granted the Motion for Summary Judgment filed by Plaintiff. A copy of the ORDER GRANTING SUMMARY JUDGMENT is attached hereto and made a part hereof by this reference, which Order shall

constitute the Findings of Fact and Conclusions of Law herein.

Good cause therefor appearing, IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. CECIL D. ANDRUS, the Secretary of the Interior shall, forthwith, cause to be filed and processed the application and supporting documents heretofore tendered by SOUTHERN PACIFIC TRANSPORTATION COMPANY to the Western Nevada Agency on or about the 28th of April, 1977, with regard to a Railroad right-of-way through Tribal lands within the Walker River Reservation.

2. The filing and processing of said application and the granting of said right-of-way shall be accomplished pursuant to the provisions of the Right-of-Way Statute of 1899 (Act of

March 2, 1899 Ch. 374, 25 U.S.C. §§312-318). Said filing, processing and granting shall not be conditioned upon the procurement of the consent of the WALKER RIVER PAIUTE TRIBE OF NEVADA.

DATED this 13 day of August 1980.

/s/ Bruce R. Thompson
U. S. DISTRICT JUDGE

PRESENTED BY:

/s/ Nathan M. Jenkins
NATHAN M. JENKINS

FILED
JULY 25, 1980

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

SOUTHERN PACIFIC TRANSPORTATION COMPANY,

Plaintiff,

Civil No. R-78-0216 BRT

vs.

CECIL D. ANDRUS, et al.,

Defendants.

and

WALKER RIVER PAIUTE TRIBE OF NEVADA,

Defendant-Intervenor./

ORDER GRANTING SUMMARY JUDGMENT

The facts of this case are related in the opinion of the Ninth Circuit Court of Appeals in United States v. Southern Pacific Transportation Company, 543 F.2d 676 (9th Cir. 1976).

Subsequent to that decision, Southern Pacific on April 28, 1977, tendered for filing with the Western Nevada Agency of the Bureau of Indian Affairs, an application for a railroad right-of-way through the Walker River Indian Reservation. The application was prepared in reliance upon the right-of-way statute of 1899. (Act of March 2, 1899 ch. 374, §1, 30 Stat. 990, 25 U.S.C. 312). A total of 50.47 miles of railroad line had been involved in the earlier action (supra). The decision of the court resulted in recognition of a valid right-of-way across 25.72 miles of ceded lands (543 F.2d at 697). The present case pertains to 10.89 miles of railroad line which traverse tribal lands, that is, un-allotted lands within the boundaries

of the Walker River Indian Reservation.

The Superintendent of the Western Nevada Agency refused to file the application and supporting documents. Two administrative appeals followed and the final agency action on June 19, 1978 affirmed the Superintendent. It was expressly held at all administrative levels that a resolution from the Walker River Tribe consenting to the grant of the requested right-of-way is an essential pre-condition to acceptance of the application for processing.

The Department's position is founded on two statutes postdating the Act of March 2, 1899. The first of these is the Indian Reorganization Act of 1934, and particularly Section 16

of the Act (25 U.S.C. 476), which provides, in part:

> "In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget and the Congress. June 18, 1934, c. 576, §16, 48 Stat. 987."

Secondly, reliance is placed upon the General Rights of Way Act of 1948,

and particularly Section 2 (25 U.S.C. 324), which provides, in part:

> "No grant of a right-of-way over and across any lands belonging to a tribe organized under sections 461-473 and 474-479, of this title; section 473a of this title and sections 358a and 362 of Title 48; and sections 501-509 of this title, shall be made without the consent of the proper tribal officials."

Finally, the clincher is said to be a regulation promulgated by the Secretary pursuant to express grant of regulatory authority (25 U.S.C. 328). The regulation states (25 C.F.R. 161.3(a), (1978):

> "No right-of-way shall be granted over and across any tribal land, nor shall any permission to survey be issued with respect to any such lands, without the prior written consent of the tribe."

Primary emphasis is placed by the government on the 1948 Act and regulation and it is said, in substance, that pre-consent of tribal authority

is required for any grant of any right-of-way across tribal lands because the 1948 Act impliedly repeals the 1899 Act and, in any event, must be read in pari material [sic] with the 1899 Act because both deal with the same subject matter - rights-of-way across tribal lands. In parsing the 1948 Act, however, defendants ignore 25 U.S.C. 326 which says "... nor shall any existing statutory authority empowering the Secretary of the Interior to grant rights-of-way over Indian lands be repealed." Surely, the 1899 Act is such statutory authority. By the same token, the defendants do not allude to 25 U.S.C. section 327 which provides for grant of rights-of-way for the use of the United States under sections 323-328 upon application by a

department or agency. Section 324 (supra) is the one that requires tribal consent, and section 328 is the one that authorizes regulations. Yet, I presume that none of us will live to see the day when the statute is construed to require tribal consent as a pre-condition to the acquisition by the United States of an essential easement for governmental purposes (the M-X missile system is a possible example). In fact, the legislative history of the 1948 Act (1948 U.S. Code. Cong. Service 1036) described 25 U.S.C. section 327 as follows: "Section 5 of the bill broadens existing powers of condemnation over individually owned Indian lands." The entire discussion of the 1948 Indian Rights of Way Act (commencing on page 1033 of the refer-

enced Congressional Service) emphasizes the intent to facilitate the procedures for obtaining rights-of-way. At no place is the purpose of granting to tribal authority a power of absolute veto even mentioned or suggested.

The foregoing leads us into a discussion of the 1899 Act (25 U.S.C. §§312-318). The full text is copied in the margin. First, we observe that that [sic] section 312 by its very language ("is granted to any railroad company") is a grant in praesenti subject to the performance of conditions precedent and conditions subsequent, as specified in the statutes.* Secondly, we note that the Act expressly applies

---

* In this respect, section 312 is similar to 43 U.S.C. section 932 (now repealed), which has frequently been interpreted as a grant in praesenti.

to a grant of a right-of-way to a railroad which has already been constructed. And, most importantly, under section 312 the participation of the Secretary of the Interior in the proceedings is strictly circumscribed. He has no general discretion to deny an application but must merely be satisfied that the application is made in good faith and with intent and ability to construct said road, and must afford parties a right to object and grant them a hearing.

Section 314 of the Act requires payment of just compensation for the right-of-way and provides an administrative procedure (three appraisers) to determine just compensation, and provides for a trial de novo in a United States District Court "and the

judgment for damages rendered by the court shall be final and conclusive." Notably, the Congress did not provide for judicial review of the right of the railroad to obtain a right-of-way by compliance with the requirements of the 1899 Act.

The foregoing summary demonstrates, we think, that the 1899 Act in question grants to the railroad the power of eminent domain. The late, great Judge Orie L. Phillips, so held in Clarke v. Boysen, 39 F.2d 800 (10th Cir. 1930). The court said:

> "By the Act of March 2, 1899, Congress granted to railroad companies the power of eminent domain to take rights-of-way through Indian Lands, upon payment of just compensation therefor. United States v. Ft. Smith & W. R. Co. (C.C.A. 8) 195 F. 211, 212. By this Act, Congress recognized the necessity and the desire for

> the construction of railroads across Indian lands. When the United States and the Indians decided to throw open for location and settlement the land designated in the Act of March 3, 1905, the desirability of inviting and encouraging construction and operation of needed and convenient lines of railroad, through such lands, was even greater than before, because the construction of such railroads would enhance the value of such lands and make them more readily salable." . . . (Emphasis supplied)

The Eighth Circuit reached the same conclusion in United States v. Ft. Smith & W.R. Co., 195 Fed. 211 (8th Cir. 1912):

> "On March 2, 1899, the day before the passage of the act which has been recited, Congress granted to this and to other railroad companies similarly situated the power of eminent domain to take rights of way through any land held by any Indian tribe and through any Indian reservation in the territory, on condition that it should make compensation therefor to the

> Nation, to any occupant and to any allottee, for the damage resulting from the taking of the right of way and the construction of the railroad, and it prescribed the same method of fixing the amounts of damages in cases of disagreement specified in the Act of March 2, 1899 (chapter 374, 30 Stat. 990, §§1, 2)."

The interpretation in Cohen's, Handbook of Federal Indian Law (1958 ed.), page 95, footnote 76 concurs:

> "The right of eminent domain may be exercised by the Federal Government over land held by an Indian nation in fee simple under patent from the United States, without the consent of the tribe. Cherokee Nation v. Kansas Ry. Co., 135 U.S. 641 (1890), which rejected the contention that land was held by the Cherokees as a sovereign nation. Some treaties provided that railroads should have rights-of-way upon payment of just compensation to the Indian tribes. Treaty of June 5, 1854, with the Miamis, Art. 10, 10 Stat. 1093. See Chapter 15, sec. 1B.

> "The Act of March 2, 1899, 30 Stat. 990, authorized any railroad company or telegraph and telephone company to take and condemn a right-of-way in or through any lands which have been or may hereafter be allotted in severalty, but have not been conveyed to the allottee with full power of alienation. The Act of February 28, 1902, sec. 23, 32 Stat. 43, discussed in Oklahoma K. & M. I. Ry. Co. v. Bowling, 249 Fed. 592 (C.C.A. 8, 1918), made this statute inapplicable to the Indian Territory and Oklahoma Territory."

The concept of tribal consent as a pre-condition to the grant of a right-of-way is the very antithesis of the exercise of the power of eminent domain. The 1948 Act cannot be construed in pari-materia with the 1899 Act. The subject matters are not even similar. The 1948 Act concerns itself with consensual "grants" of rights-of-

way freely negotiated at arms length (excepting, as we have seen, section 327 concerning acquisitions by department or agencies of the United States). By contrast, the 1899 Act authorizes the taking and condemnation of rights-of-way for railroads and other uses without consent.

Defendants rely on Plains Elec. Gen. & Tr. Co-op v. Pueblo of Laguna, 542 F.2d 1375 (10th Cir. 1976), which dealt with statutes solely applicable to the Pueblo Indians. We find the rationale of the case to be supportive of our conclusions. The court, there, first held that the Act of May 10, 1926, 44 Stat. 498, was repealed by the Act of April 21, 1928, 45 Stat. 422, 25 U.S.C. 322, and said: "The 1928 Act is so inconsistent with the

1926 Act that it must be held to repeal the 1926 Act under the principle of Posados v. National City Bank, supra." Neither of these statutes is involved in the present case and we have observed no irreconcilable inconsistency between the 1899 Act and the Indian Reorganization Act and the Indian Rights of Way Act of 1948.

The Pueblo of Laguna case then proceeded to discuss the 1948 Act and holds that it, too, together with the 1928 Act, repeals the 1926 Act because of a "very real antagonism" between the statutes. But it is beyond our understanding that a court can create an implied repeal in the face of direction Congressional declaration "nor shall any existing statutory authority empowering the Secretary of

the Interior to grant rights-of-way over Indian lands be repealed." The regulation, 25 C.F.R. 161.3(a), supra, if interpreted to require tribal consent to the exercise of a statutory power of eminent domain is an invalid regulation inasmuch as it is inconsistent with the statutes and beyond the power of the Secretary to promulgate.

Defendants also contend that the Court of Appeals in the earlier case, United States v. Southern Pacific Transporation Co. (supra), precluded plaintiff from relying on the 1899 Act. Not so. The court rejected plaintiff's reliance on the 1899 Act because the railroad had not complied with the requirements of the Act, "including the requirements that maps be filed and approved and that compen-

sation be paid to the Indians." (543 F.2d at 691). We read the court's discussion of the 1899 Act as impliedly recognizing that the Act is a grant in praesenti of a right-of-way (like the 1875 Act) provided that all the statutory conditions are fulfilled. The very purpose of the application for a right-of-way which is the subject matter of the present action is to comply fully with the conditions of the 1899 Act.

We hold that tribal pre-consent is not a condition precedent to consideration of plaintiff's application for a right-of-way under the Act of March 2, 1899, and that the Department of Interior should be required to process the application.

Accordingly,

IT HEREBY IS ORDERED:

1. The motion for summary judgment filed by the Secretary of Interior, and joined by Intervenor, is denied.

2. The motion for summary judgment filed by plaintiff is granted.

3. Within ten days plaintiff's counsel shall submit an appropriate form of summary judgment.

DATED July 25, 1980.

/s/ Bruce R. Thompson
UNITED STATES DISTRICT JUDGE

March 2, 1899.

CHAP. 374.-An Act To provide for the acquiring of rights of way by railroad companies through Indian reservations, Indian lands, and Indian allotments, and for other purposes.

General Right of way to railroads through Indian lands granted.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a right of way for a railway, telegraph and telephone line through any Indian reservation in any State or Territory, or through any lands held by an Indian tribe or nation in Indian Territory, or through any lands reserved for an Indian agency or for other purposes in connection with the Indian service, or through any lands which have been allotted in severalty to any individual Indian under any law or

treaty, but which have not been conveyed to the allottee with full power of alienation, is hereby granted to any railroad company organized under the laws of the United States, or of any State or Territory, which shall comply with the provisions of this Act and such rules and regulations as may be prescribed thereunder: Provided,

Provisos.

Approval of Secretary of the Interior.

That no right of way shall be granted under this Act until the Secretary of the Interior is satisfied that the company applying has made said application in good faith and with intent and ability to construct said road, and in case objection to the granting of such right of way shall be made, said Secretary shall afford the parties so object-

Parallel rights of way.

ing a full opportunity to be heard: Provided further, That where a railroad has heretofore been constructed, or is in actual course of construction, no parallel right of way within ten miles on either side shall be granted by the Secretary of the Interior unless, in his opinion, public interest will be promoted thereby.

Width.

SEC. 2. That such right of way shall not exceed fifty feet in width on each side of the center line of the road, except where there are heavy cuts and fills, when it shall not exceed one hundred feet in width on each side of the road, and may include ground adjacent thereto for station buildings, depots, machine shops, side tracks, turn-outs, and water

Additional ground for stations, etc.

stations, not to exceed one hundred feet in width by a length of two thousand feet, and not more than one station to be located within any one continuous length of ten miles of road: Provided, That this section shall apply to all rights of of way heretofore granted to railroads in the Indian Territory where no provisions defining the width of the rights of way are set out in the Act granting the same.

Proviso.
Applicable to Indian Territory, etc.

Maps to be filed.

SEC. 3. That the line of route of said road may be surveyed and located through and across any of said lands at any time, upon permission therefor being obtained from the Secretary of the Interior; but before the grant of such right of way shall

become effective a map of the survey of the line or route of said road must be filed with and approved by the Secretary of the Interior, and the company must make payment to the Secretary of the Interior for the benefit of the tribe or nation, of full compensation for such right of way including all damage for improvements and adjacent lands, which compensation shall be determined and paid under the direction of the Secretary of the Interior in such manner as he may prescribe. Before any such railroad shall be constructed through any land, claim, or improvment, held by individual occupants or allottees in pursuance of any treaties or laws of the United States, compensation shall be made

Damages.

to such occupant or allottee for all property to be taken, or damage done, by reason of the construction of such railroad. In case of failure to make amicable settlement with any such occupant or allottee, such compensation shall be determined by the appraisement

Appraisal.

of three disinterested referees, to be appointed by the Secretary of the Interior, who, before entering upon the duties of their appointment, shall take and subscribe before competent authority an oath that they will faithfully and impartially discharge the duties of their appointment, which oath, duly certified, shall be returned with their award to the Secretary of the Interior. If the referees can not agree,

then any two of them are authorized to make the award. Either party being dissatisfied with the finding of the referees shall have the right within sixty days after the making of the award and notice of the same, to appeal, in case the land in question is in the Indian Territory, by original petition to the United States court in the Indian Territory sitting at the place nearest and most convenient to the property sought to be condemned; and if said land is situated in any State or Territory other than the Indian Territory, then to the United States district court for such State or Territory, where the case shall be tried de novo and the judgment for damages rendered

Appeal.

by the court shall be final and conclusive. When proceedings are commenced in court as aforesaid, the railroad company shall deposit the amount of the award made by the referees with the court to abide the judgment thereof, and then have the right to enter upon the property sought to be condemned and proceed with the construction of the railway. Each of the referees shall receive for his compensation the sum of four dollars per day while engaged in the hearing of any case submitted to them under this Act. Witnesses shall receive the fees usually allowed by courts within the district where such land is located. Costs, including compensation of the referees, shall be made part of the award or

Construction to commence on deposit of the award.

Fees, costs, etc.

judgment, and be paid by such railroad company.

Construction, -forfeiture.

SEC. 4. That if any such Company company shall fail to construct and put in operation one-tenth of its entire line in one year, or to complete its road within three years after the approval of its map of location by the Secretary of the Interior, the right of way hereby granted shall be deemed forfeited and abandoned ipso facto as to that portion of the road not then constructed and in operation:

Proviso -extension of time for completion.

Provided, That the Secretary may, when he deems proper, proper, extend, for a period not exceeding two years, the time for the completion of any road for which right of way has been granted and a part of which shall have been built.

Annual Rental.

SEC. 5. That where a railroad is constructed under the provisions of this Act through the Indian Territory there shall be paid by the railroad company to the Secretary of the Interior, for the benefit of the particular nation or tribe through whose lands the road may be located, such an annual charge as may be prescribed by the Secretary of the Interior, not less than fifteen dollars for each mile of road, the same to be paid so long as said land shall be owned and occupied by such nation or tribe, which payment shall be in addition to the compensation otherwise required herein. And within the Indian Territory upon any railroad constructed under the provisions of this Act the rates and charges for

Passenger and freight rates, Indian Territory.

passenger and freight service, if not otherwise prescribed by law, may be prescribed by the Secretary of the Interior from time to time, and the grants herein are made upon condition that the companies shall transport mails whenever required to do so by the Post Office Department.

Railroad rights on public lands. Vol.18,p.482.

SEC. 6. That the provisions of section two of the Act of March third eighteen hundred and seventy-five, entitled "An Act granting to railroads the right of way through the public lands of the United States", are hereby extended and made applicable to rights of way granted under this Act and to railroad companies obtaining such rights of way.

Regulations.

SEC. 7. That the Secretary of the Interior shall make all needful rules and regulations,

not inconsistent herewith, for the proper execution and carrying into effect of all the provisions of this Act.

Amendment.

SEC. 8. That Congress hereby reserves the right at any time to alter, amend, or repeal this Act, or any portion thereof.

Approved, March 2, 1899.

APPENDIX B

4. Amended Summary Judgment, entered 28 August 1980, by the United States District Court, District of Nevada.

FILED
AUGUST 28, 1980

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

SOUTHERN PACIFIC TRANSPORTATION COMPANY,

Plaintiff,

Civil No. R-78-0216 BRT

vs.

CECIL D. ANDRUS, et al.,

Defendants,

and

WALKER RIVER PAIUTE TRIBE OF NEVADA,

Defendant-Intervenor. /

AMENDED SUMMARY JUDGMENT

On motion of the United States, and good cause appearing,

IT HEREBY IS ORDERED that the Summary Judgment filed August 14, 1980 is hereby amended to provide as follows:

1. Cecil D. Andrus, the Secretary of the Interior, shall forthwith cause to be filed and processed the application and supporting documents heretofore tendered by Southern Pacific Transportation Company to the Western Nevada Agency on or about the 28th of April, 1977, with regard to a railroad right-of-way through tribal lands within the Walker River Reservation.

2. The filing and processing of said application shall be accomplished pursuant to the provisions of the Right-of-Way Statute of 1899 (Act of March 2, 1899, Ch. 374, 25 U.S.C. §§312-318). Said filing and processing shall not be conditioned upon the procurement of the consent of the Walker River Paiute Tribe of Nevada.

3. This action is remanded to the Secretary of the Interior for further action in accordance with this judgment and accompanying order.

DATED August 27, 1980.

/s/ Bruce R. Thompson
UNITED STATES DISTRICT JUDGE

Office-Supreme Court, U.S.
FILED
OCT 13 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-180

In the Supreme Court of the United States

OCTOBER TERM, 1983

SOUTHERN PACIFIC TRANSPORTATION COMPANY, PETITIONER

v.

JAMES G. WATT, SECRETARY OF THE INTERIOR, ET AL.

and

WALKER RIVER PAIUTE TRIBE OF NEVADA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

REX. E. LEE
Solicitor General

F. HENRY HABICHT II
Acting Assistant Attorney General

JACQUES B. GELIN
MARTIN W. MATZEN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the Secretary of the Interior may lawfully require by regulation that a railroad obtain the consent of an Indian tribe before applying for a right-of-way across tribal lands pursuant to the Act of Mar. 2, 1899, 25 U.S.C. 312 *et seq.*

2. Whether, assuming that the consent requirement is consistent with the 1899 Act, the provision granting rule-making authority to the Secretary exceeded Congress's power to delegate its legislative authority.

3. Whether the Secretary's imposition of a tribal consent requirement constituted an impermissible subdelegation of power to the Indian tribe.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provisions involved	2
Statement	2
Argument	4
Conclusion	13

TABLE OF AUTHORITIES

Cases:

American Trucking Associations Inc. v. *United States*, 344 U.S. 298 9

Clarke v. *Boysen*, 39 F.2d 800, cert. denied, 282 U.S. 869 6

FPC v. *Tuscarora Indian Nation*, 362 U.S. 99 11

Noble v. *Oklahoma City*, 297 U.S. 481 7

A.L.A. Schechter Poultry Corp. v. *United States*, 295 U.S. 495 10

Udall v. *Tallman*, 380 U.S. 1 5

United States v. *Ft. Smith & W.R. Co.*, 195 F. 211 ..... 6, 7

United States v. *Mazurie*, 419 U.S. 544 10

Page

Statutes and regulations:

Act of Mar. 2, 1899, 25 U.S.C. 312 *et seq.* 2, 3, 4, 5, 6, 7, 8, 9, 10

25 U.S.C. 312 7
25 U.S.C. 314 7
25 U.S.C. 317 7

Act of Mar. 3, 1899, ch. 453, 30 Stat. 1368 6

Act of Mar. 3, 1905, ch. 1452, 33 Stat. 1016 6

General Rights-of-Way Act of 1948, 25 U.S.C. 323 *et seq.* 2, 4

25 U.S.C. 324 9

Indian Reorganization Act, 25 U.S.C. 476 9

Natural Gas Act, 15 U.S.C. 717f(h) 11

25 U.S.C. 177 10

25 C.F.R. (1939):

Pt. 256 5

Section 256.16 5

25 C.F.R. 161.3(a) (1981) 3

25 C.F.R. :

Pt. 169 5

Section 169.3(a) 4, 5

Page

Miscellaneous:

Davis, *Administrative Law Treatise* (1978) 9

3 Fed. Reg. 985 (1938) 5

H.R. Rep. 1896, 55th Cong., 3d Sess. (1899) 8

H.R. Rep. 91-78, 91st Cong., 1st Sess. (3d Report) (1968) 12

Staff of the House Comm. on Government Operations, 91st Cong., 1st Sess. (3d Report), *Disposal of Rights in Indian Tribal Lands Without Tribal Consent* (Comm. Print 1969) 11

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-180

SOUTHERN PACIFIC TRANSPORTATION COMPANY, PETITIONER

v.

JAMES G. WATT, SECRETARY OF THE INTERIOR, ET AL.

and

WALKER RIVER PAIUTE TRIBE OF NEVADA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Supp. App. A1, at 1)[1] is reported at 700 F.2d 550. The opinion of the district court (Supp. App. B3, at 1) is not reported. The final decision of the Department of the Interior (Supp. App. B2, at 1) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 1, 1983. A petition for rehearing was denied on June 9, 1983 (Pet. App. C3, at x). The petition for a writ of

---

[1]Certain materials in the appendix to the petition have been reproduced in a separate volume, cited herein as "Supp. App."

certiorari was filed on July 12, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The Act of Mar. 2, 1899, 25 U.S.C. 312 *et seq.*, is set forth at Pet. App. D4 at xiv. The General Rights-of-Way Act of 1948, 25 U.S.C. 323 *et seq.*, is set forth at Pet. App. D5, at xv.

STATEMENT

1. Petitioner operates a railway in the western United States, a portion of which runs through Reservation lands held by the United States in trust for the benefit of respondent Walker River Paiute Tribe of Nevada. *United States* v. *Southern Pacific Transportation Co.*, 543 F.2d 676 (9th Cir. 1976). Petitioner and its predecessors have operated the line through the Reservation continuously since 1882, and indeed, until 1976, petitioner assumed that it had acquired, sometime during the nineteenth century, a valid easement for its railway and adjoining telephone and telegraph lines. In 1976, however, the Ninth Circuit held that petitioner had failed to acquire necessary congressional approval either directly through a special Act or indirectly by complying fully with an 1899 Act, which permits railroads to obtain rights-of-way across Indian lands. 543 F.2d at 685, 690-691. Accordingly, the court held that with regard to a 10.89 mile stretch of railway, petitioner was a trespasser on the Tribe's land. 543 F.2d at 699.

On April 28, 1977, petitioner filed an application, pursuant to the Act of March 2, 1899, 25 U.S.C. 312 *et seq.* ("1899 Act"), with the local office of the Department of the Interior's Bureau of Indian Affairs, seeking a right-of-way for its railway and telephone and telegraph line over the 10.89 miles on which the court of appeals had held petitioner was a trespasser (Pet. App. A1, at 552). On May 4, 1977, the Agency Superintendent returned the application without

filing it because, inter alia, petitioner had failed to include evidence that the Tribe had consented to the right-of-way as required by 25 C.F.R. 161.3(a) (1981) (Supp. App. A1, at 10, 12).[2] Petitioner sought administrative review by both the Department's Assistant Area Director in Phoenix and the Assistant Secretary for Indian Affairs. Both upheld the decision not to file the application without the Tribe's consent; the latter action constituting the Department's final decision (Supp. App. B2, at iii).

2. Petitioner then filed the instant suit in the United States District Court for the District of Nevada, seeking declaratory relief and an injunction requiring the Secretary to file, process and approve petitioner's right-of-way application without the Tribe's consent. The district court granted petitioner's motion for summary judgment, holding alternatively that the 1899 Act constituted (1) an in praesenti grant of a right-of-way to any railroad company that satisfied the *statutory* conditions for obtaining the grant or (2) a grant to such companies of the power of eminent domain. Supp. App. B3, at 12-17. The court held that the Department's requirement that petitioner obtain tribal consent was inconsistent with either reading of the 1899 Act and therefore was beyond the power of the Secretary to impose (Supp. App. B3, at 13, 17, 20, 21). The district court entered judgment requiring the Secretary to file and process the right-of-way application under the 1899 Act, notwithstanding the lack of consent by the Tribe (Supp. App. B4, at v).

The court of appeals reversed (Supp. App. A1, at 550-556). It held that the Secretary's regulation requiring tribal consent was permissible under the 1899 Act. It pointed out

---

[2] 25 C.F.R. 161.3(a) (1981) provides:

> No right-of-way shall be granted over and across any tribal land, nor shall any permission to survey be issued with respect to any such lands, without the prior written consent of the tribe.

that the Act expressly granted rulemaking authority to the Secretary and that the legislative history indicated that the Act was intended fully to protect Indian interests. Pet. App. A1, at 552-553. Accordingly, the court concluded that the tribal consent requirement was a reasonable exercise of the Secretary's properly delegated authority under the 1899 Act.[3] The court of appeals also found support for its conclusion in the General Rights of Way Act of 1948, 25 U.S.C. 323 *et seq.*, which requires tribal consent for most rights-of-way across Indian lands. The 1948 Act demonstrated clearly that Congress believed a consent requirement preserved and protected Indian interests (Pet. App. A1, at 559).

ARGUMENT

1. Petitioner argues (Pet. 35-40) that the consent requirement in 25 C.F.R. 169.3(a) was not intended to apply to the 1899 Act and therefore the consent requirement should not have been imposed upon its application. In support of this assertion, petitioner points out that the regulation expressly refers to the 1948 Act as the source of its authority and claims that no tribal consent requirement was imposed until after the 1948 Act. This issue plainly does not warrant review by this Court.

Obviously, as the agency that adopted the regulation, the Department of the Interior is in the best position to determine whether its regulation was intended to apply more broadly than to rights-of-way created under the 1948 Act.

---

[3]The court of appeals also rejected the district court's holding that the 1899 Act granted eminent domain power to petitioner. It noted that the 1899 Act lacked the characteristic "take and use" language to describe the railroad's authority under the Act (Pet. App. A1, at 554). The court also rejected petitioner's claim that the Secretary could not lawfully delegate to the Tribe the power to disapprove the right-of-way. The court held that the delegation of the power to disapprove to "a body with independent authority over the affected lands" was permissible (*id.* at 556).

The Department's interpretation of the intended scope of its regulation is entitled to great weight by the courts. *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). Moreover, the Secretary's interpretation is fully consistent with the language of Section 169.3(a), which imposes a consent requirement generally. The regulation dealing with railroad rights-of-way, 25 C.F.R. 169.23, expressly subjects such rights-of-way to all pertinent requirements in Part 169, which would include the unlimited consent requirement in Section 169.3(a). There is simply no basis for doubting that the Department intended the regulation to apply to grants under the 1899 Act, and the court of appeals correctly deferred to the Department's interpretation of the regulation as applying to petitioner's application under the 1899 Act.[4]

2a. Petitioner contends (Pet. 40-49) that the tribal consent requirement is inconsistent with the 1899 Act. First, petitioner argues (Pet. 40-42) that the statute granted it the power of eminent domain, which by definition is a taking of property without the owner's consent. In this regard petitioner asserts that the decision below is in conflict with statements in opinions of two other circuits, which "characterized" (Pet. 29) the 1899 Act as an eminent domain statute. The holding by the court below that the 1899 Act is not an

---

[4]Petitioner's assertion (Pet. 36) that "no consent regulation existed" until after passage of the 1948 Act is mistaken. Such a requirement was promulgated on May 24, 1938 (3 Fed. Reg. 985), as part of the general regulations governing rights-of-way across Indian lands, 25 C.F.R. Pt. 256 (1939). The regulation provided in pertinent part:

> [Section] *256.83 Consent of allottees or tribe.* • • • Where tribal lands are involved, belonging to a tribe which is organized under the Act of June 18, 1934 [IRA] (48 Stat. 987; 25 U.S.C. 476), all right-of-way applications must be presented to the tribal council or other authorized representative body • • •.

Part 256 expressly covered, inter alia, applications for railroad rights-of-way under the 1899 Act. 25 C.F.R. 256.16 (1939).

eminent domain statute is, however, a correct interpretation of the 1899 Act that conflicts with no decision of any other court and accordingly does not warrant review by this Court.

As the court of appeals noted (Supp. App. A1, at 26 n.2), its holding that the 1899 Act does not grant petitioner the power of eminent domain over tribal lands is contrary to dicta in opinions of two other courts of appeals, which in passing characterized the statute as a condemnation act. See *United States* v. *Ft. Smith & W. R. Co.*, 195 F. 211, 212, 214 (8th Cir. 1912) and *Clarke* v. *Boysen*, 39 F.2d 800, 814 (10th Cir.), cert. denied, 282 U.S. 869 (1930).

Ft. Smith specifically involved the Act of Mar. 3, 1899, ch. 453, 30 Stat. 1368, a special Act passed for the benefit of a particular railroad company on the day after the 1899 Act at issue here was enacted. The case involved only allotted lands, and the only question was whether the Creek Nation was entitled to compensation under the special Act even though no tribal lands had been taken and the allottees had already been compensated. Accordingly, the court's characterization of the 1899 Act as an eminent domain statute was completely unnecessary to the decision.

Similarly, *Clarke* v. *Boysen, supra*, involved lands which were no longer tribal; they had been ceded and opened for settlement and the proceeds of the sale had been set aside for the benefit of the Indians pursuant to the Act of Mar. 3, 1905, ch. 1452, 33 Stat. 1016. While the court did repeat the *Ft. Smith* characterization that the 1899 Act was an eminent domain statute (39 F.2d at 814), its holding that the lands in question remained subject to the 1899 Act's provisions in no way depended on the character of that statute. The decision rested, instead, on the court's conclusion that the ceded and opened lands were, "until location and entry by settlers" (39 F.2d at 814), "lands reserved * * * for other

purposes in connection with the Indian service" under Section 1 of the 1899 Act, 25 U.S.C. 312. There is thus no decisional conflict that requires this Court to decide whether the 1899 Act is an eminent domain statute.

Moreover, the decision below is fully consistent with the language and structure of the statute. The 1899 Act does not authorize a railroad to obtain a right-of-way in the manner characteristically used in an eminent domain statute. It lacks the "take and use" language that this Court has held clearly indicates that eminent domain power has been conferred. See *Noble* v. *Oklahoma City*, 297 U.S. 481, 490 (1936). See also *United States* v. *Ft. Smith & W.R. Co.*, 195 F.2d at 212. Nor does the statute clearly provide a judicial forum for determining just compensation for the condemnation of unallotted lands, which would ordinarily be included in an eminent domain statute. 25 U.S.C. 314 (authorizing the Secretary alone to determine compensation in the case of tribal lands). Finally, there is no hint in the legislative history that Congress intended to confer eminent domain authority on railroads in obtaining rights-of-way. Accordingly, there is no reason for this Court to review the decision below that the 1899 Act did not grant eminent domain power to the railroads.

2b. Petitioner argues alternatively (Pet. 42-48) that a tribal consent requirement is inconsistent with the structure of the 1899 Act, and that the only conditions on the grant that can properly be imposed are those expressly provided in the Act. But this argument ignores the plain language of the statute. Congress expressly required the railroads to comply with the statutory requirements "*and* such rules and regulations as may be prescribed thereunder." 25 U.S.C. 312. Moreover, Congress granted the Secretary power to make "*all needful rules.*" 25 U.S.C. 317 (emphasis added). It is simply impossible to reconcile that language with petitioner's contention that Congress intended to preclude the

Secretary from adopting any requirements in addition to those expressly set out in the statute. As the court of appeals pointed out: "[t]he grant of rulemaking authority in section 1 would be superfluous if it did not confer authority to promulgate requirements, beyond those specified in the Act" (Supp. App. A1, at 553).

Nor does the legislative history support petitioner's claim. As the Ninth Circuit concluded in its earlier *Southern Pacific* decision (543 F.2d at 692), "[t]he 1899 Act was meant to protect fully Indian interests." Petitioner argues that only the statutory conditions to the grant were designed to protect the Indians, but an important part of the 1899 Act was the delegation of rulemaking authority to the Secretary of the Interior and there is no basis for concluding that that provision was not intended to further the pro-Indian purpose of the Act. See H.R. Rep. 1896, 55th Cong., 3d Sess. 2 (1899). It cannot be doubted that the consent requirement is intended to permit the Tribe, which as the beneficial owner of the land has the most at stake, to decide what arrangement best protects its interests. Accordingly, the regulation is consistent with Congress's expressed intention in adopting the 1899 Act.[5]

---

[5]The 1899 Act was adopted to end the need for time-consuming special legislation to permit railroads to acquire rights-of-way on tribal lands. Prior to the 1899 Act, Congress, in its special Acts, sometimes included consent requirements and sometimes it did not. See Pet. 55-56 and n.36. The thrust of petitioner's argument here is that Congress in the 1899 Act, which was intended to protect Indians, suddenly decided without explanation to preclude absolutely any future imposition of a requirement for tribal consent, even where the Secretary might find —as Congress itself had found in enacting earlier special legislation —such a condition necessary or desirable for the protection of the Indians. Nothing in the brief legislative history of the 1899 Act supports such a radical change (see Supp. App. A1, at 19-20.

In addition, the reasonableness of the Secretary's interpretation of the 1899 Act is buttressed by Congress's inclusion of a tribal consent requirement — under which petitioner would also be required to secure the Tribe's consent — in the 1948 General Rights-of-Way Act, 25 U.S.C. 324. See also Section 16 of the Indian Reorganization Act, 25 U.S.C. 476. In the absence of a clear legislative statement requiring such a result, it would be anomolous to require tribal consent for all rights-of-way, except those sought by railroads.[6]

3. Petitioner argues (Pet. 48-64) that the delegation of rulemaking authority in the 1899 Act is unconstitutional. This argument is frivolous. It is settled that a congressional delegation of authority to an agency is permissible so long as statutory standards can be inferred against which the agency's action can be judged. See, *e.g.*, *American Trucking Associations Inc.* v. *United States*, 344 U.S. 298, 312-313 (1953); Davis, *Administrative Law Treatise* 160-166 (1978). The 1899 Act satisfies this standard; it allows the railroads to obtain rights-of-way on tribal lands, so long as the Tribe's interests are fully protected. The policy of the Act is clearly expressed and serves to constrain adequately the Secretary's exercise of rulemaking authority. This is hardly

---

[6]In light of the unusual posture of this case, review of petitioner's controversy is particularly inappropriate. The decision of the Department not to file the application as submitted does not finally resolve anything. The decision does not mean that petitioner must abandon its railway line; a petition by the Tribe for ejectment is pending in a separate law suit (Pet. 24). Nor indeed is it clear that the decision necessarily precludes petitioner from obtaining a right-of-way under the 1899 Act. Petitioner presumably could still apply and submit evidence of tribal consents apparently obtained prior to 1882 and ask the Secretary to decide that they satisfy the regulation (see *United States* v. *Southern Pacific Transportation Co.*, 543 F.2d at 681). Of course, it would be completely in the Secretary's discretion whether to grant such an application.

a delegation that can seriously be compared to the "delegation running riot" that was declared impermissible by this Court in the cases cited by petitioner. See *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495, 553 (1935) (Cardozo, J., concurring).

4. Petitioner contends (Pet. 65-72) that granting the Tribe authority to prohibit a right-of-way is an unconstitutional delegation of power to a private entity. But, in fact, the tribal consent requirement is not a delegation at all. Absent any congressional action, the railroads would have to obtain tribal consent before they could build a railway through reservation lands owned by the Tribe, just as they would in order to use any other landowner's property. In addition, the railroad would also be required to obtain Congress's approval for any right-of-way the Tribe approved. See 25 U.S.C. 177. By passing the 1899 Act, which authorizes railroads under certain conditions to acquire rights-of-way on tribal lands, Congress dealt generally with the requirement of *its* consent; the statute is silent regarding the Tribe's consent. Under the Secretary's interpretation, Congress in the 1899 Act chose not to eliminate the requirement that a railroad should reach agreement with the Tribe in order to use the Tribe's land. Declining to withdraw a right the Tribe otherwise would be entitled to exercise is fundamentally different from delegating a power to regulate that would not exist but for Congress's action. Even in the latter case, a delegation of authority to a Tribe is generally permissible because of the sovereign authority of the Tribe, compare *United States* v. *Mazurie*, 419 U.S. 544, 556-557 (1975), but in the former case there is simply no real delegation of power. In any event, it is plain that permitting the Tribe to retain its sovereign authority to decide how its lands should be used is not an impermissible delegation of authority. *United States* v. *Mazurie*, *supra*.

5. Finally, petitioner (Pet. 23, 24-25, 73) and amici[7] argue that the decision below will create a tremendous burden on them because tribal consent will be costly and, in some cases, unattainable. These claims, however, are both greatly exaggerated and presented to the wrong branch of government. First, both INGAA and Transwestern acknowledge that their pipeline rights-of-way are governed by a wholly different statute, the Natural Gas Act, a provision of which, 15 U.S.C. 717f(h), they contend should be interpreted as conferring power on them to condemn tribal lands. Cf. *FPC* v. *Tuscarora Indian Nation*, 362 U.S. 99 (1960). Accordingly, their particular concerns may not be affected at all by the decision below. But even assuming their rights-of-way are subject to the tribal consent requirement upheld by the court below, their claim, along with petitioner's and Burlington Northern's, is wholly speculative. There is no substantial evidence to show that the tribal consent requirement has created any undue difficulties for public utilities seeking to obtain rights-of-way across Indian territories. Indeed, experience indicates that the consent requirement has created no real problems. The Secretary of the Interior reported to Congress in 1968 that "[g]enerally, those requiring rights-of-way over tribal lands have encountered no particular problems in obtaining Indian consent. The bargaining process usually produces agreements without unusual difficulties." Staff of the House Comm. on Government Operations, 91st Cong., 1st Sess. (3d Report), *Disposal of Rights in Indian Tribal Lands Without Tribal Consent* 41 (Comm. Print 1969).

---

[7]See Motion of Burlington Northern Railroad Company at 4-5; Brief of Interstate Natural Gas Association of American ("INGAA") at 2-3; and Brief of Transwestern Pipeline Company at 2-3, 5-6.

Even if experience with the tribal consent requirement had been less favorable, however, it is clear that Congress, and not this Court, is the appropriate body for remedying such problems. As the House Committee on Government Operations recognized in 1968 in expressing its disapproval of a proposal by the Secretary to eliminate tribal consent for a particular class of Tribes (not one including the Tribe involved here) (H.R. Rep. 91-78, 91st Cong., 1st Sess. (3d Report) 9 (1969); emphasis added):

> If there are frequent instances of Indian tribes unreasonably refusing to consent to the Secretary's granting of rights-of-way over their land which are essential to the fulfillment of public purposes and the public welfare, the *Congress might consider enacting legislation* authorizing the person or agency seeking the right-of-way to institute a suit for condemnation thereof in a federal court.

Since Congress has not seen fit to pass such a statute, there is no reason for this Court to review the decision below in order to pass on the wisdom of having a tribal consent requirement.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

F. HENRY HABICHT II
Acting Assistant Attorney General

JACQUES B. GELIN
MARTIN W. MATZEN
Attorney

OCTOBER 1983

DOJ-1983-10

Office Supreme Court, U.S.
FILED
OCT 5 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-180

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1983

SOUTHERN PACIFIC TRANSPORTATION COMPANY,

Petitioner,

v.

JAMES G. WATT, et al., and the WALKER RIVER PAIUTE TRIBE OF NEVADA,

Respondents.

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF THE WALKER RIVER PAIUTE TRIBE IN OPPOSITION

Yvonne T. Knight
Counsel of Record
Jeanne S. Whiteing
Native American Rights Fund
1506 Broadway
Boulder, Colorado 80302
(303) 447-8760

Attorneys for Respondent
The Walker River Paiute Tribe

October, 1983

QUESTION PRESENTED

Whether pursuant to the Act of March 2, 1899, 30 Stat. 990, 25 U.S.C. §§312-318, the Secretary of the Interior can require tribal consent as a precondition to the filing and processing of an application for a railroad right-of-way across tribal trust lands of the Walker River Paiute Tribe of Nevada.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	4
ARGUMENT	
I. The Decision Below Gives Effect To Longstanding, Congressionally Approved Regulations Governing Rights of Way Across Tribal Land	6
II. The Decision is Consistent With Decisions of This Court and the Courts of Appeal	16
III. Review is Otherwise Inappropriate	20
A. Authority of the Secretary	21
B. Delegation	26
IV. The Court's Judgment Can Also Be Sustained on Other Grounds.	32
CONCLUSION	36

TABLE OF AUTHORITIES

Cases: Page

Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831) 16

Clarke v. Boysen, 39 F.2d 800 (10th Cir. 1930) 20

Escondido Mutual Water Co. v. Federal Energy Regulatory Comm., 698 F.2d 1223 (9th Cir. 1982) . . . 18,29

Helvering v. Reynolds Co., 306 U.S. 110 (1939) 12,18

Helvering v. Winmill, 305 U.S. 79 (1938) 12

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) 13

Montana v. United States, 450 U.S. 544 (1981) 17

Morton v. Ruiz, 415 U.S. 199 (1974) 12

Nance v. Environmental Protection Agency, 645 F.2d 701 (9th Cir. 1981), cert. denied, 50 U.S.L.W. 3447 (Dec. 7, 1981) 27,30

New Mexico v. Mescalero Apache Tribe, ___ U.S. ___, 51 U.S.L.W. 4741 (June 14, 1983) 13,17

New York Indians (Fellows v. Denniston), 72 U.S. (5 Wall.) 761 (1867) 16

Table of Authorities (cont.) Page

Cases:

Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) 26,27

Plains Electric Generation and Transmission Cooperative, Inc. v. Pueblo of Laguna, 542 F.2d 1375 (10th Cir. 1976) 10

Ramah Navajo Sch. Bd. v. Bureau of Revenue, ___ U.S. ___, 73 L.Ed.2d 1174 (1982) 13

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) 17

Sioux Tribe of Indians v. U.S., 316 U.S. 317 (1942) 12

Southern Pacific Transportation Co. v. Watt (Southern Pacific II), 700 F.2d 550 (9th Cir. 1983) . . 4,18,29

Udall v. Tallman, 380 U.S. 1 (1965) 22

United States v. Ft. Smith & W.R. Co., 195 F. 211 (8th Cir. 1912) 19,20

United States v. 43 Gallons of Whiskey, 93 U.S. 188 (1876) . . . 16

United States v. Mazurie, 419 U.S. 544 (1975) 26,28

United States v. Midwest Oil Co., 236 U.S. 459 (1915) 12

Table of Authorities (cont.) Page

Cases:

United States v. Santa Fe Pacific Railroad Co., 314 U.S. 339 (1941) . 17

United States v. Sheffield Board of Commissioners, 435 U.S. 110 (1978) 12

United States v. Shoshone Tribe, 304 U.S. 111 (1938) 17

United States v. Southern Pacific Transportation Co. (Southern Pacific I), 543 F.2d 676 (9th Cir. 1976) 2,12,15,25

Vigil v. Andrus, 667 F.2d 931 (10th Cir. 1982) 12

White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) . . . 13

Wilson v. Omaha Indian Tribe, 442 U.S. 653 (1979) . . . . . .

Statutes and Other Laws:

25 U.S.C. §§ 312-318 . . . . . i,2,4,20

25 U.S.C. § 322 10,25

25 U.S.C. §§ 323 et seq. . . . 2,33,34

25 U.S.C. § 326 35

25 U.S.C. § 407 29

25 U.S.C. § 476 1,23,32

Table of Authorities (cont.) Page

Statutes and Other Laws:

25 U.S.C. § 1302 27

42 U.S.C. § 7401-7642 30

43 U.S.C. §§ 934 et seq. 25

43 U.S.C. § 1761 15

1 Stat. 50 16

22 Stat. 299 14

25 Stat. 160 14

26 Stat. 102 14

28 Stat. 665 14

30 Stat. 1368 19,24

90 Stat. 2793 15

25 C.F.R. Part 11 29

25 C.F.R. § 163.7 29

25 C.F.R. § 169.23 8

25 C.F.R. § 211.28 30

25 C.F.R. § 256.83 7,8,33

40 C.F.R. § 52.21 30

43 C.F.R. § 4.200 29,30

1976 Pueblo Lands Act 34

Table of Authorities (cont.) Page

Other Authorities:

S. Rep. No. 823, 80th Cong., 2d Sess. (1948), reprinted in 1948 U.S. Code Cong. & Adm. News 1033 34

H.R. Rep. No. 78, 91st Cong., 1st Sess. (1969) 34

H.R. Rep. No. 1896, 55th Cong., 3d Sess. 2 (1899) 15,22

H. Rep. No. 91-78, 91st Cong., 1st Sess. 3 (1967) 9,32

H.R. Rep. No. 94-800, 94th Cong., 2d Sess. 34 (1976), reprinted in 1976 U.S. Code & Adm. News 2370 31

Hearings Before the Subcommittee on Indian Affairs on S.217, 94th Cong., 1st Sess. 4 (1975) 26

Conf. Rep. No. 94-1439, 94th Cong., 2d Sess. 3 (1976) 10,11

3 Federal Register 984 7

32 Federal Register 5512 9

1A Sutherland, Statutory Construction Section 22.13 35

Cohen, Original Indian Title, 32 Minn. L. R. 28 (1947) 17

Table of Authorities (cont.) Page

Other Authorities:

Prucha, American Indian Policy in the Formative Years (Harvard Univ. Press, 1962) 16

R. Collins, Implied Limitations on the Jurisdiction of Indian Tribes, 54 Wash. L. R. (1979) . . . 28

1 Antieau, Municipal Corporation Law § 5.28 at 81-82 (1982) 29

STATEMENT OF THE CASE

The issue in this case grows out of a decision by the Secretary of the Interior to reject an application by Southern Pacific Transportation Company for a right-of-way across lands held in trust for the Walker River Paiute Tribe of Nevada.1/ The application was rejected because it lacked tribal consent.

Southern Pacific filed the application on April 28, 1977 because a 1976 decision of the Ninth Circuit Court of Appeals held that Southern Pacific had never complied with applicable federal laws governing the acquisition of railroad rights-of-way

---

1/ The Walker River Paiute Tribe of Nevada is the governing body of the Walker River Indian Reservation and is organized pursuant to § 16 of the Indian Reorganization Act, 25 U.S.C. §476.

across Indian lands and therefore the railroad was a trespasser on tribal and allotted lands [2] of the Walker River Indian Reservation. United States v. Southern Pacific Transportation Company, 543 F.2d 676 (9th Cir. 1976) (hereinafter Southern Pacific I). Pet. App. B ii.

The Superintendent for the Western Nevada Agency of the Bureau of Indian Affairs initially rejected the application because it lacked any evidence of tribal consent. [3] The Superintendant's

---

2/ The right-of-way application at issue, however, involves only tribal trust lands and not allotted lands.

3/ Southern Pacific cited the Act of March 2, 1899, 30 Stat. 990, 25 U.S.C. §§ 312-318 (the 1899 Act), as the sole authority for the application. A supplemental response from the Superintendent informed Southern Pacific that the application should have been filed under the 1948 Indian Rights of Way Act, 62 Stat. 17, 25 U.S.C. § 323 et seq. (the 1948 Act), which expressly requires tribal consent for right-of-way grants.

decision was subsequently affirmed by the Assistant Area Director for the Phoenix Area Office of the Bureau of Indian Affairs, and by the Assistant Secretary of the Interior for Indian Affairs. Pet. App. B iii.

Southern Pacific sought review of the Secretary's decision in the district court for the District of Nevada claiming that tribal consent was not necessary for railroad right-of-way grants under the 1899 Act. The Walker River Paiute Tribe intervened as a party defendant, and argued, along with the United States, that tribal consent was required. Judgment was entered by the district court in favor of Southern Pacific on August 14, 1980, and amended on August 28, 1980. Pet. App. B iv. and v. The district court held that tribal consent

could not be a condition precedent to a railroad right-of-way grant pursuant to the 1899 Act.

On appeal, the Ninth Circuit reversed and held that "[t]he Secretary acted within his power in requiring by regulation that tribal consent be obtained for the acquisition of rights-of-way pursuant to the 1899 Act, 25 U.S.C. § 312 (1976)." Southern Pacific Transportation Co. v. Watt, 700 F.2d 550, 556 (9th Cir. 1983) (hereinafter Southern Pacific II). Southern Pacific seeks review of this decision.

SUMMARY OF ARGUMENT

The tribal consent precondition required by the Secretary for the right-of-way at issue is a longstanding, congressionally approved requirement which is rooted in and consistent with principles

governing tribal sovereignty and with federal Indian policy. Both preserve and protect the right of Indian tribes to consent to and control the use of their lands.

The decision below gives full effect to these principles and policies and is consistent with decisions of this Court and the Courts of Appeals. There are no conflicts with decisions of any court.

The consent precondition is also in accord with the Secretary's broad authority under the 1899 Act, and is supported by provisions in the 1934 Indian Reorganization Act and the 1948 Indian Rights of Way Act which require tribal consent for all right-of-way grants and other dispositions of tribal land.

ARGUMENT

I. The Decision Below Gives Effect to Longstanding, Congressionally Approved Regulations Governing Rights of Way Across Tribal Land.

Tribal consent has been a part of the Secretary of the Interior's right of way regulations since at least 1928 - a period of 55 years. The 1928 regulations specifically require tribal consent for railroad rights-of-way. Section 79 of the regulations states:

> Where tribal lands are involved, all railroad and other right-of-way applications of more than ordinary importance should be presented to the tribe in general council assembled. A record of the proceedings shall be kept and a duly authenticated copy of such minutes should be attached. Except in the case of railroads the approval of the Secretary of the Interior may be given in his discretion, even though no amicable settlement has been reached with the Indians. However, it is required that every effort be made to bring about an amicable agreement whenever reasonably possible. (Emphasis added).

Regulations of the U.S. Department of Interior Concerning Rights of Way Over Indian Lands, U.S. Govt. Printing Office, 1929. Subsequently, regulations in 1938 provided:

> 256.83 Consent of allottees or Tribe.... Where tribal lands are involved, belonging to a tribe which is organized under the Act of June 18, 1934 ..., all right-of-way applications must be presented to the tribal council or other authorized representative body; and, in the case of unorganized tribes, all railroad rights-of-way and others of more than ordinary importance, should likewise be thus submitted to the council or representative body of the tribe. A record of the proceedings should be kept and a duly authenticated copy attached to the schedule.

25 C.F.R. §256.83 (1939-40), 3 Fed. Reg. 984, 985 (May 24, 1938).[4/] The consent

---

4/ Southern Pacific's assertion that the consent requirement was first promulgated in 1951 (Petition at 33, n.11) is incorrect. The 1951 regulations amended the 1938 regulations and were intended to implement the 1948 Act. Ignoring the earlier regulations, Southern Pacific

provision has appeared in all subsequent regulations governing rights-of-way. See 25 C.F.R. §256.3(a) (1951) (the 1951 regulations); and 25 C.F.R. §161.3(a), redesignated 25 C.F.R. §169.3(a) (1982).

(footnote 4 contined) contends that the tribal consent requirement applies only to grants under the 1948 Act. It points to the reference in section 256.3(c) of the 1951 regulations that the 1948 Act is the authority for the consent provision. But section 256.3(c) applies only to allotted lands, not tribal lands. Moreover, the 1951 regulations recite the 1948 Act as authority for all sections, including section 256.23 which implements the specific provisions of the 1899 Act.

Southern Pacific also relies on the statement in the current regulations, 25 C.F.R. § 169.23, that railroad rights-of-way granted under the 1899 Act are subject to "pertinent sections of this Part 169," and argues that tribal consent is not one of the pertinent sections. But the present regulations contain provisions dealing with other existing special right-of-way statutes, and these provisions would not be pertinent to railroad rights-of-way. See, e.g., §169.25 (oil and gas pipeline); §169.26 (telephone and telegraph lines) and §169.28 (public highways).

Congress has twice expressly approved the tribal consent provision in the regulations. In 1967, a House Committee recommended against proposed regulations, 32 Fed. Reg. 5512 (1967), which would have eliminated the consent requirement for rights-of-way across tribal lands of non-IRA tribes. The House Committee investigated the matter and concluded that:

> ... the Secretary's proposal for granting rights-of-way over tribal land without the consent of the tribe which owns it violates property rights, democratic principles, and the pattern of modern Indian legislation.
>
> The committee believes that the Secretary's assertion of power to act in disregard of his own regulation and issue rights-of-way over lands of tribes that have withheld their consent to such grants is contrary to law, as well as to good government, and should not be entertained.

H. Rep. No 91-78, 91st Cong., 1st Sess. 3 (1967). The Committee cited "one of the oldest principles of jurisprudence in

America - that Indian tribes should not be deprived of rights in their land without their consent." Id. at 17.

In 1976, Congress repealed a 1926 act which authorized condemnation of Pueblo tribal lands and made applicable to the Pueblos the 1899 Act, the 1948 Act and other special rights of way acts. Act of Sept. 17, 1976, 90 Stat. 1275, 25 U.S.C. §322. See Plains Electric Generation and Transmission Cooperative, Inc., v. Pueblo of Laguna, 542 F.2d 1375 (10th Cir. 1976). In so doing, Congress authorized the Pueblo tribes to consent to right-of-way grants across their lands, thereby placing them "in the same position ... as other federally recognized Indian tribes." Conf. Rep. No. 94-1439, 94th Cong. 2d Sess. 3 (1976). The necessity for this was that:

> ... the 1926 Act denies the Pueblos the right of consent in considering applications for rights-of-way across their lands for whatever purpose. On the other hand, those tribes that organized constitutional governments pursuant to the Act of June 18, 1934 (48 Stat. 987), clearly, were provided the right of consent in considering rights-of-way applications. Moreover, the balance of federally recognized tribes have been granted the privilege of consent through Secretarial regulations.

Id. Obviously, Congress would not have repealed the 1926 condemnation statute on the one hand, and made the 1899 Act applicable on the other hand, unless it believed that Pueblo consent was necessary for grants under the 1899 Act.

In reenacting the right-of-way statutes in 1976, the above legislative history shows that Congress explicitly approved the Secretary's regulations which contained a tribal consent requirement for right-of-way grants including those made pursuant to the

1899 Act. See, United States v. Sheffield Board of Commissioners, 435 U.S. 110, 134-35 (1978); Helvering v. Reynolds Co., 306 U.S. 110, 116 (1939); Helvering v. Winmill, 305 U.S. 79, 83 (1938). Such approval also confirms the Secretary's authority to require tribal consent for all types of right-of-way grants for all tribes whether IRA or non-IRA. See e.g., Morton v. Ruiz, 415 U.S. 199, 214, 229-30 (1974); Vigil v. Andrus, 667 F.2d 931, 934-35 (10th Cir. 1982). 5/

5/ Congress' longstanding acquiescence in the Secretary's regulatory scheme also evinces an implied delegation by Congress to the Secretary of the authority to establish tribal consent as a pre-condition. See, United States v. Midwest Oil Co., 236 U.S. 459, 472-75 (1915); Sioux Tribe of Indians v. U.S., 316 U.S. 317, 327 (1942); Southern Pacific I, supra at 686, 689.

The Secretary's regulatory scheme is fully consistent with current federal Indian policy of encouraging tribal self-sufficiency and economic development. See, New Mexico v. Mescalero Apache Tribe, ___ U.S. ___, 51 U.S.L.W. 4741, 4744 (June 24, 1983); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 138 n.5 (1982); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 n.10 (1980). It is also consistent with the rule that federal Indian statutes and regulations must be "construed generously in order to comport with ... traditional notions of sovereignty and with the federal policy of encouraging tribal independence." Ramah Navajo Sch. Bd. v. Bureau of Revenue, ___ U.S. ___, 73 L.Ed.2d 1174, 1175 (1982).

Southern Pacific argues that the federal policy of encouraging railroad

expansion in the late 1800's controls and divested tribes of the power to consent. The history of railroad expansion vis a vis Indian reservations does not bear this out, however, and in any case, the national interest in protecting tribal lands is paramount.[6/]

Until 1899, railroad right-of-way grants across tribal lands were authorized only by special acts of Congress. When self-executing railroad right-of-way grants across public lands were authorized in 1875, Indian reservations were expressly excepted. Act of March 3, 1875, 18 Stat.

6/ In right-of-way statutes prior to and after 1899, Congress apparently did not find tribal consent to be inconsistent with the promotion, growth and expansion of an interstate railroad system. See Act of August 5, 1882, 22 Stat. 299; Act of May 30, 1888, 25 Stat. 160; Act of May 8, 1890, 26 Stat. 102, Act of Feb. 18, 1895, 28 Stat. 665, all cited in Pet. at 56 n.36.

482, 43 U.S.C. § 938. See Southern Pacific I, supra at 687-89. 7/ Later, the 1899 Act authorized administrative grants of railroad rights-of-way across tribal lands to eliminate the need for special acts and to achieve uniformity, but in a manner which would "fully preserve and protect the rights and interests of Indians." H.R. Rep. No. 1896, 55th Cong., 3d Sess. 2 (1899). If railroad expansion had been paramount, Congress could have simply amended the 1875 Act to include Indian reservations rather than enacting a special statute protective of Indian lands.

7/ The 1875 Act was repealed in 1976, 90 Stat. 2793. Presently rights-of-way for public utility purposes including railroads can be acquired over public lands through a grant from the Secretary. See 43 U.S.C. §1761.

II. The Decision is Consistent With Decisions of this Court and the Courts of Appeal

Congress has always respected, and this Court has upheld, the right of Indians to consent to and control the use of their lands.[8] Thus this Court has required

---

8/ This policy was articulated early in history in the Northwest Ordinance of 1787, ratified by the First Congress, 1 Stat. 50, 52:

> The utmost good faith shall always be observed toward the Indians. Their lands and property shall never be taken from them without their consent; and in their property, rights and liberty they shall never be invaded or disturbed unless in just and lawful wars authorized by Congress ....

The policy is relied on in numerous Supreme Court decisions, e.g., Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831); United States v. 43 Gallons of Whiskey, 93 U.S. 188, 197 (1876); New York Indians (Fellows v. Deniston), 72 U.S. (5 Wall.) 761, 768 (1867); Wilson v. Omaha Indian Tribe, 442 U.S. 653, 665 (1979). See also, Prucha, American Indian Policy in the Formative Years (Harvard University Press, 1962), p. 40.

that any congressional intent to deprive a Tribe of its rights or interests in or over its land without its consent be clear and unequivocal. United States v. Santa Fe Pacific Railroad Co., 314 U.S. 339, 353 (1941); United States v. Shoshone Tribe, 304 U.S. 111, 117-18 (1938); cf. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 60 (1978). See also, Cohen, "Original Indian Title," 32 Minn. L.R. 28, 36-37 (1947).

Most recently this Court has stated that "[a] tribe's power to exclude non-members entirely or to condition their presence on the reservation is ... well established." New Mexico v. Mescalero Apache Tribe, supra 51 U.S.L.W. at 4743. See also Montana v. United States, 450 U.S. 544, 557 (1981). The power derives from the dual role of a tribe as a landowner and

a local government, see e.g., Merrion v. Jicarilla Apache Tribe, supra, 455 U.S. at 145 n.12, and includes the "sovereign power of determining the conditions upon which persons shall be permitted to enter its domain, to reside therein, and to do business...." Id. The right to condition a right-of-way grant on the consent of a tribe is certainly in accordance with these principles. See Escondido Mutual Water Co. v. F.E.R.C., 692 F.2d 1223, 1231-1233 (9th Cir. 1982).

Southern Pacific suggests that there is a conflict in the circuits as to whether the 1899 Act is an eminent domain statute. See discussion infra at 24-26. However, as recognized by the court below, the purported conflict involves only dicta. Southern Pacific II, supra at 555 n.2.

In United States v. Ft. Smith & W.R. Co., 195 F. 211 (8th Cir. 1912), the statute involved was an eminent domain statute, 30 Stat. 1368, passed one day after the 1899 Act. At issue, was a right-of-way across individual allotted lands. In dictum, the Eighth Circuit compared the special act with certain provisions of the 1899 Act and stated that the 1899 Act also granted eminent domain power over tribal and allotted lands. But the Eighth Circuit obviously was not required to make, nor did it make, a careful analysis of the 1899 Act. If it had, it would have found that Congress passed the special act granting the Railroad condemnation power precisely because it believed that the 1899 Act did not grant such power. Furthermore, the

court would have discovered that the condemnation provisions of the 1899 Act it cites apply only to allotted lands. See section 3 of the Act, 25 U.S.C. §314.

The decision of the Tenth Circuit in Clarke v. Boysen, 39 F.2d 800 (10th Cir. 1930) likewise did not turn on whether the 1899 Act is an eminent domain statute. The Tenth Circuit did not independently analyze the 1899 Act, but simply cited and relied upon the erroneous findings of the Eighth Circuit in United States v. Ft. Smith & W.R. Co., supra.

III. Review is Otherwise Inappropriate

Southern Pacific raises additional questions regarding the authority of the Secretary to require tribal consent as a precondition for a railroad right-of-way. None of these issues warrant review.

A. Authority of the Secretary.

The tribal consent precondition is within the Secretary's authority. The 1899 Act on its face authorizes the Secretary to establish grant preconditions by regulation. Section 1 provides that a right-of-way:

> is hereby granted to any railroad company ... which shall comply with the provisions of this Act and such rules and regulations as may be prescribed thereunder. (Emphasis added).

This provision requires compliance with the act and administrative rules and regulations, and constitutes a grant of broad authority to the Secretary which by its terms contemplates regulations which go beyond the specific conditions enumerated in the Act. Thus tribal consent, although not specifically provided for in the 1899

Act, is authorized by the Act and has been required by the Secretary for grants under the Act since at least 1928.

It is by now a fundamental rule that substantial deference shall be given to the construction of a statute by the agency charged with its administration. Udall v. Tallman, 380 U.S. 1, 16 (1965). The standard for reviewing the agency's construction is whether it is reasonable. Id.

The Secretary's regulation requiring tribal consent as a grant precondition is entirely consistent with the purpose of the 1899 Act to allow administrative grants of railroad rights-of-way in a manner which would "fully preserve and protect the rights and interests of the Indians." H.R. Rep. No. 1896, supra at 2. The tribal consent regulation is a reasonable means of achieving this purpose. Indeed, as

Southern Pacific points out in its Petition at 31-33, the protective effect of a tribal consent requirement to administrative conveyances of tribal land prompted Congress to require consent for all such conveyances as part of section 16 of the IRA, 25 U.S.C. §476.

The consent provision is based on a long history of federal policies and legal principles which respect the right of Indians to control the use of their land, see discussion supra at 16-18 . These basic principles and policies, along with the purpose of the 1899 Act as set out in its terms and legislative history, provide the standards by which the Secretary exercises his authority. These standards govern many aspects of Indian affairs, see note 11 supra, and guard against any arbitrary action by the Secretary.

Southern Pacific argues that tribal consent is inconsistent with the 1899 Act because the 1899 Act is "in the nature of an eminent domain statute." Pet. at 40. But the specific language of the statute supports a different conclusion. On its face, the statute requires that the railroad comply with conditions in the Act, as well as the Secretary's rules and regulations in order for a right-of-way to issue. This is in contrast to the right-of-way granted to the Fort Smith and Western Railroad Company the day after the 1899 Act, where the Railroad was:

> invested and empowered with the right of locating, constructing, owning, equipping, operating, using, and maintaining a railway and telegraph and telephone line through the Choctaw and Creek nations....

Section 1 of the Act of March 3, 1899, 30 Stat. 1368. It is also in contrast with

the earlier 1875 statute granting rights-of-way across public domain land. Section 1 of this Act provides that:

> ... a right of way through the public lands ... is hereby granted to any railroad company ... which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization ... to the extent of one hundred feet on each side of the control line of said road. ...

Section 1 of the Act of March 3, 1875, 18 Stat. 482, 43 U.S.C. §934 et seq. This language has been interpreted as a grant in praesenti, Southern Pacific I, supra at 691.

Congress obviously has not interpreted the 1899 Act as an eminent domain statute. In 1976, when it repealed the 1926 Pueblo lands railroad condemnation statute, and made the 1899 Act applicable, the purpose was to abolish condemnation of Pueblo lands. Act of Sept. 17, 1976, 90 Stat. 1275. See Hearings Before the

Subcommittee on Indian Affairs on S. 217, 94th Cong. 1st Sess. 4 (1975). It would have made no sense for Congress to repeal one railroad condemnation statute and in the same breath make another condemnation statute applicable. Thus Congress' interpretation of the 1899 Act rejects its characterization as an eminent domain statute, and supports the authority of the Secretary to require tribal consent.

B. Delegation

Southern Pacific also argues that requirement of tribal consent is an unconstitutional delegation of authority to Indian tribes. However, such delegation is fully consistent with this Court's decision in United States v. Mazurie, 419 U.S. 544 (1975). In Mazurie, the limitations on the power to delegate recognized in Panama Refining Co. v. Ryan, 293 U.S. 388 (1935),

were found to be "less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter." Id. at 556-57. The underlying rationale was that the delegatee tribe is required to afford due process to non-members under the Indian Civil Rights Act, 25 U.S.C. Section 1302, and that the Fifth Amendment may also be available to protect against arbitrary tribal action. Id. at 558 n.12. 9/ These are the standards by which the Tribe must exercise its authority. See Nance v. Environmental Protection Agency, 645 F.2d 701, 714-16 (9th Cir. 1981)(upholding the

9/ Of course, any issue of whether the Tribe's exercise of its delegated authority denied Southern Pacific any rights of due process is not properly before this Court. The only issue squarely presented by this case is whether the delegation itself is valid.

constitutionality of the delegation to tribes of the power to redesignate air quality even where it affects areas off the reservation). See R. Collins, "Implied limitations On The Jurisdiction of Indian Tribes" 54 Wash. L.R. 479, 523 (1979).

Thus to the extent that the Secretary's tribal consent regulation constitutes a delegation of his power to regulate railroad right-of-way grants, the delegation is valid under Mazurie. 10/ In fact, if

10/ In any case, it is arguable that the tribal consent regulation is a delegation of the Secretary's regulatory power under the 1899 Act. Rather, the regulations merely confirm that the Secretary in exercising his power under the 1899 Act will defer action until the Tribe exercises its inherent power as landowner and consents to a conveyance of its property. Statutes requiring consent of persons as a precondition to government action have generally been upheld against claims of unconstitutional delegation of power. The reasoning is that the power to

the delegation of power to regulate liquor is valid then the delegation of power to regulate the use of tribal lands is a fortiori valid because it is an even more basic attribute of tribal sovereignty. See Escondido Mutual Water Co. v. F.E.R.C, supra, 698 F.2d at 1233 n.6. 11/

(footnote 10 continued)consent to the exercise of regulatory authority is not power to regulate where the ultimate power to take action remains in the government. See generally, 1 Antieau, Municipal Corporation Law, Section 5.28 at 81-82 (1982). Here, the ultimate power to approve a railroad right of way remains in the Secretary. Southern Pacific II, supra, 700 F.2d at 556.

11/ The Secretary has delegated power to tribes in many other instances, even where no express legislative authorization exists. See e.g., 25 C.F.R. Part 11 establishing Courts of Indian Offenses and authorizing tribes in Section 11.1(e) to preempt certain regulations through the passage of inconsistent tribal ordinances; 25 C.F.R. §163.7 promulgated under 25 U.S.C. § 407, authorizing tribal consent to sale of timber on tribal lands; 43 C.F.R.

Southern Pacific and amici raise the spectre that tribes will unreasonably withhold their consent. However Congress has considered this argument on several occasions and has expressly rejected it as a reason for divesting tribes of the right to consent. In 1976 when Congress applied the 1899 Act and other right-of-way acts to the Pueblo tribes, see discussion supra at 10-11

(footnote 11 continued) §4.200 promulgated under various statutory authority authorizing tribal preemption of the Secretary's regulations establishing rules governing the settlement of trust estates of deceased Indians; and 25 C.F.R. § 211.28 promulgated under various Indian mineral leasing statutes authorizing tribes to supersede the Secretary's regulations governing leasing of tribal lands for mining purposes See also 40 C.F.R. §52.21(g)(1) promulgated under the Clean Air Act, 42 U.S.C. § 7401-7642, authorizing tribes to redesignate the air quality on their reservations from that already established by the Environmental Protection Agency. This authority was upheld in Nance v. Environmental Protection Agency, supra.

it responded to the argument by stating: "Should public necessity require rights-of-way across the lands of the Pueblo notwithstanding the lack of consent of the Pueblos, the Congress retains its authority to grant such rights-of-way." H.R. Rep. No. 94-800, 94th Cong., 2d Sess. 34 (1976) reprinted in 1976 U.S. Code Cong. & Ad. News 2370.

Again, in 1969, when Congress rejected proposed regulations which would have divested non-IRA tribes of the right to consent to rights-of-way, the argument was also rejected. The House Committee which reviewed the regulations recognized that "[t]here may be cases where overwhelming public necessity will justify the condemnation of rights-of-way over tribal Indian land despite the opposition of the Indian landowners." It nevertheless

believed that "involuntary disposal of the Indians' property rights ought not to be done by administrative action of the Interior Department." Instead, the Committee stated that such cases ought to be left to resolution by Congress. H.R. Rep. No. 91-78, supra at 9. Clearly Congress has never believed that the issue raised by Southern Pacific and amici warrants divesting tribes of the power to consent (or withhold consent) for rights-of-way across their lands.

IV. The Court's Judgment Can Also Be Sustained On Other Grounds

The Ninth Circuit's decision rests solely on construction of the 1899 Act, but it also may be sustained on other grounds. Both section 16 of the Indian Reorganization Act, 25 U.S.C. Section 476, and section 2 of the 1948 Indian Rights of Way

Act, 25 U.S.C. Section 324, require tribal consent for rights-of-way across Indian lands and would apply to the railroad right-of-way at issue.

Section 16 of the IRA empowers tribes organized under the Act "to prevent the sale, disposition, lease, or encumbrance of tribal lands ...." The right-of-way regulations issued by the Secretary in 1938 implement the tribal consent condition required by the IRA, 25 C.F.R. §256.83 (1st ed. 1939-40), and apply to railroad right-of-way grants across tribal lands as well as other dispositions of tribal lands.

When Congress enacted the 1948 Indian Rights of Way Act, it believed that IRA tribes already possessed the power to consent to dispositions of their land for rights-of-way under the various existing

special acts. See S. Rep. No. 823, 80th Cong., 2d Sess. (1948), reprinted in 1948 U.S. Code.Cong. & Adm. News 1033, 1036. Thus Congress sought to "preserve the powers" of IRA tribes to consent to right-of-way grants by expressly providing for such consent in the 1948 Act. See section 2 of the 1948 Act, 25 U.S.C. §324. 12/

Alternatively, the 1899 Act and all other special right-of-way statutes authorizing secretarial grants were implicitly amended in 1948 to require tribal consent when they were incorporated into the comprehensive and uniform scheme for granting rights-of-way contemplated by the 1948 Act. See, S. Rep. No. 823, supra. Congress specifically considered the

12/ See also discussion of the 1976 Pueblo Lands Act supra at 10-11, and H.R. Rep. No. 78, 91st Cong. 1st Sess. (1969) discussed supra at 9-10.

treatment of special right- of-way statutes in the 1948 Act's comprehensive scheme and decided to preserve them as parts of the scheme. 25 U.S.C. §326. It is reasonable to infer that the same Congress which so carefully preserved the power of IRA tribes to consent to rights-of-way, intended that this power apply to those special right-of-way acts preserved under the same act. In instances where Congress knowingly includes pre-existing statues as parts of an overall legislative scheme, implied amendment of such statutes is in keeping with Congress' intent in enacting the comprehensive scheme. 1A Sutherland, Statutory Construction, Section 22.13.

CONCLUSION

The writ of certiorari should be denied.

Respectfully submitted,

Yvonne T. Knight
Counsel of Record
Jeanne S. Whiteing
Native American Rights Fund
1506 Broadway
Boulder, Colorado 80302
(303) 447-8760

Attorneys for the Walker River
Paiute Tribe of Nevada

October 1983

83-180

Office Supreme Court, U.S.
FILED
AUG 11 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term 1983

No. _____

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Petitioner

vs.

JAMES G. WATT, et al., and WALKER RIVER
PAIUTE TRIBE OF NEVADA,
Respondents

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[redacted]AMICUS CURIAE BRIEF BY BURLINGTON NORTHERN RAILROAD COMPANY AND MOTION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI BY SOUTHERN PACIFIC TRANSPORTATION COMPANY

BURLINGTON NORTHERN RAILROAD COMPANY
BY WILLIAM A. BRASHER
(COUNSEL FOR SERVICE)

BY LAWRENCE D. SILVERNALE
350 Central Building
Seattle, Washington 98104
Telephone: (206) 625-6444

PRAYN PRINTING COMPANY SEATTLE, WASHINGTON

IN THE

Supreme Court of the United States

October Term 1983

No. _____

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Petitioner

vs.

JAMES G. WATT, et al., and WALKER RIVER PAIUTE TRIBE OF NEVADA,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[redacted] AMICUS CURIAE BRIEF BY BURLINGTON NORTHERN RAILROAD COMPANY AND MOTION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI BY SOUTHERN PACIFIC TRANSPORTATION COMPANY

BURLINGTON NORTHERN RAILROAD COMPANY
BY WILLIAM A. BRASHER
(COUNSEL FOR SERVICE)

BY LAWRENCE D. SILVERNALE
350 Central Building
Seattle, Washington 98104
Telephone: (206) 625-6444

FRAYN PRINTING COMPANY SEATTLE, WASHINGTON

COMES NOW Burlington Northern Railroad Company and files this, its motion to file amicus curiae brief and motion in support of Southern Pacific Transportation Company's petition for certiorari and states:

Movant Burlington Northern Railroad Company has a direct and substantial interest in the issues involved in this proceeding which may not adequately be addressed by the current parties. Additionally, movant would show that the issues in this case involve areas of national transportation policy and are of vital importance to the national interest. Movant has not yet received written consent of all parties to this proceeding to file an amicus brief but such consent is anticipated.

Burlington Northern Railroad Company is a Class I common carrier by rail

operating in interstate and foreign commerce. A portion of this railroad system includes a line to Anacortes, Washington, which serves a number of rail shippers, including two large petroleum refineries which rely heavily on rail service.

In 1977 the Swinomish Indian Community claimed ownership of a portion of the Burlington Northern Railroad Company's right of way between Anacortes and the remainder of Burlington Northern's railroad. Although Burlington Northern denies that the Swinomish Tribal Community has any interest in said right of way, nevertheless a right of way filing was made by Burlington Northern Railroad Company under the Act of 1899, 25 U.S.C. §312-318, in order to continue rail service to Anacortes if the court determined that the tribe owned the lands in dispute.

As in the Southern Pacific case, the Secretary of the Interior rejected Burlington Northern Railroad Company's right of way filing under the 1899 Act for lack of tribal consent. Burlington Northern then brought an action in the U.S. District Court for the Western District of Washington to require the Secretary of the Interior to accept its right of way filing on the ground that the 1899 Act does not require tribal consent and that imposing the requirement of tribal consent effectively repeals the 1899 Act.[1]

The District Court for the Western District of Washington, having been made aware of the pendency of the matter of Southern Pacific v. Watt, elected to stay the proceeding until the Ninth United

---

1. Burlington Northern v. Andrus, et al., United States District Court, Western District of Washington, Cause No. C79-1199V

States Circuit Court of Appeals ruled finally on the Southern Pacific case. If the tribal consent requirement is sustained in the Southern Pacific case, and the United States District Court for the Western District of Washington concludes that the Swinomish Tribal Community or the United States of America has ownership of any portion of Burlington Northern's right of way, the effect will probably be to either cut off rail service to Anacortes, Washington, or to require the Burlington Northern Railroad Company to comply with excessive tribal demands for compensation, thus unreasonably increasing the cost of service to consumers.

This is not an isolated circumstance. Burlington Northern Railroad Company crosses a number of Indian reservations, large and small, throughout its

service territory. In order to maintain a modern, safe, efficient railroad system, it is necessary from time to time to alter rights of way to decrease gradient and curvature or to improve alignments. The right of way adjustments to achieve these results occur regularly and will continue to occur in the future. If the Ninth Circuit's interpretation of the 1899 Act is sustained, the effect will be to freeze in time all railroad rights of way through Indian reservation trust lands and prevent needed alterations and modifications to maintain a safe and efficient rail system unless tribal consent is granted for such change. Such an interpretation subjects vital rail service to the whim of the tribe.

CONCLUSION

Burlington Northern believes that a reading of the Act of 1899 and its

carefully designed provisions to establish just compensation compels the conclusion that it is an eminent domain statute which does not require tribal consent and which is effectively repealed where the Secretary engraphs the requirement of tribal consent. Burlington Northern respectfully submits that the Southern Pacific's Petition for Certiorari should be granted and that the Ninth Circuit ruling in this case be reversed with the Secretary of the Interior instructed to accept Southern Pacific's right of way filing under the 1899 Act. Movant further requests leave to file an amicus curiae brief should petitioner's petition for certiorari be granted.

Respectfully submitted,

BURLINGTON NORTHERN RAILROAD COMPANY

By_____
William A. Brasher

AFFIDAVIT OF SERVICE BY MAIL

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

The undersigned, being first duly sworn, on oath states: That on this day affiant deposited in the mails of the United States of America properly stamped and addressed envelopes containing a copy of this document directed to the attorneys of record in this matter, as follows:

Peter Echeverria, Esq.
Nathan M. Jenkins, Esq.
Echeverria and Osborne, Chartered
555 South Center Street
Reno, Nevada 89501

Robert J. Foley, Esq.
William R. Foley, Esq.
Foley, Mc Intosh & Foley
1225 Solano Avenue
Albany, California 94706

Anthony C. Liotta, Esq.
Anne S. Almy, Esq.
Laura Frossard, Esq.
United States Department of Justice
Appellate Section
Land & Natural Resource Division
Room 2338
Main Justice Department Building
Washington, D.C. 20530

Anne Louise Riecke, Esq.
Santa Fe Industries, Inc.
224 South Michigan Avenue
Chicago, Illinois 60604

Yvonne T. Knight, Esq.
Jeanne S. Whiteing, Esq.
Native American Rights Fund
1506 Broadway
Boulder, Colorado 80302

_____
William A. Brasher

SUBSCRIBED AND SWORN TO before me this _____ day of August, 1983.

_____
Notary Public in and for the State of Washington, residing at _____

Office-Supreme Court, U.S.
FILED
SEP 2 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-180

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Petitioner,

v.

JAMES G. WATT, *et al.*, and
WALKER RIVER PAIUTE TRIBE OF NEVADA,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

JOHN H. CHEATHAM, III, ESQUIRE
1660 L Street, N.W.
Washington, D.C. 20036
(202) 293-5770

ATTORNEY FOR
Interstate Natural Gas Association of America

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C. (202) 347-8203

TABLE OF CONTENTS

	Page
INTEREST OF AMICUS CURIAE	1
CONSENT OF PARTIES	4
ARGUMENT	4
CONCLUSION	6

TABLE OF AUTHORITIES

CASES:	Page
Cudahy Packing Co. v. *Holland*, 315 U.S. 357 (1942)	5
Eubank v. *City of Richmond*, 226 U.S. 137 (1912)	5
Montana v. *United States*, 450 U.S. 544 (1981)	5
Oliphant v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978)	5
United States v. *Wheeler*, 435 U.S. 313 (1978)	5
Washington ex rel. *Seattle Title Trust Co.* v. *Roberge*, 278 U.S. 116 (1928)	5
STATUTES:	
Department of Energy Organization Act, 42 U.S.C. § 7101, *et seq.*	1
Natural Gas Act, 15 U.S.C. § 717, *et seq.*	1
Section 7(b), 15 U.S.C. § 717f(b)	3
Section 7(h), 15 U.S.C. § 717f(h)	3
Natural Gas Policy Act, 15 U.S.C. § 3301, *et seq.*	1
Act of August 5, 1882, ch. 394, 22 stat. 299	5
Act of May 30, 1888, ch. 336, 25 stat. 160	5
Act of May 8, 1890, ch. 198, 26 stat. 102	5
Act of February 18, 1895, ch. 95, 28 stat. 665	5
Act of May 2, 1899, 25 U.S.C. § 312	4, 5
Act of March 3, 1901, 25 U.S.C. § 319	4
Act of March 4, 1904, 25 U.S.C. § 321	2, 4, 5
Act of February 5, 1948, 25 U.S.C. § 323-328	2, 5
REGULATIONS:	
25 C.F.R. § 169.3 (1982)	2, 3, 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-180

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Petitioner,

v.

JAMES G. WATT, *et al.*, and
WALKER RIVER PAIUTE TRIBE OF NEVADA,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF

This amicus curiae brief is respectfully submitted by the Interstate Natural Gas Association of America (INGAA) in support of the Petition for Writ of Certiorari of the Southern Pacific Transportation Company.

INTEREST OF AMICUS CURIAE

INGAA is a nonprofit national trade association representing virtually all of the major long-distance natural gas transmission companies in the United States. These companies are subject to the regulatory jurisdiction of the Federal Energy Regulatory Commission (Commission or FERC) under the Natural Gas Act (15 U.S.C. § 717, *et seq.*), the Department of Energy Organization Act (42 U.S.C. § 7101, *et seq.*) and the Natural Gas Policy Act (15

U.S.C. § 3301, *et seq.*). A list of INGAA's membership is set forth in the appendix to this brief.

There are hundreds of miles of interstate natural gas pipelines being operated across Indian lands. The right-of-way permits for such facilities have generally been obtained from the Secretary of Interior pursuant to the Act of March 4, 1904 (the "1904 Pipeline Right-of-Way Act"), codified at 25 U.S.C § 321 (1976), and the Act of February 5, 1948 (the "1948 General Right-of-Way Act"), codified at 25 U.S.C. § 323-328 (1976). Such permits are issued for a limited term, usually 20 years.[1] When they expire, new or renewal permits are required. The decision of the Ninth Circuit affirming the Secretary's consent regulation (25 C.F.R. § 169.3 (1982)) puts these facilities and the services provided by them in jeopardy.

Under § 169.3, tribal consent is required as a condition to the issuance of all permits for rights-of-way across Indian lands. With literally hundreds of millions of dollars in pipeline facilities in place under permits which have expired or are about to expire, the consent requirement, if upheld with respect to the 1904 Pipeline Right-of-Way Act, would enable the tribes to cause the removal or discontinuation of the use of such facilities in the absence of agreement between the natural gas company and the tribe on the compensation to be paid. It could likewise cause the termination of service provided by such facilities or the uneconomic relocation of facilities around Indian lands.

In addition, by conditioning all rights-of-way across tribal lands on tribal consent, § 169.3(a) vests broad pow-

---

[1] The 1904 Act provides for a 20-year term with the right of an additional 20-year extension to be granted by the Secretary. 25 U.S.C. § 321 (1976).

er in the tribes to block construction by INGAA's members of new pipeline projects that contemplate facilities across Indian lands or, alternatively, to require additional expenditures to reroute facilities around tribal lands.

Under Section 7 of the Natural Gas Act, 15 U.S.C. § 717f(b) (1976), INGAA's members, as regulated natural gas companies, cannot discontinue or abandon service without the authorization of the Federal Energy Regulatory Commission. The refusal of an Indian tribe to consent to the grant or renewal of a permit when existing facilities are in operation could preclude continuation of service or impose a severe financial burden on the natural gas company and its customers through exorbitant demands of the tribe for the granting of its consent.[4]

The rates at which INGAA's members sell gas to their respective customers are regulated by the Federal Energy Regulatory Commission under the Natural Gas Act. In many instances, INGAA's members find that they are losing sales to lower-cost alternative fuels. Additional costs associated with the necessity of paying whatever price is demanded by tribal authorities for the issuance of the consent necessary to satisfy the requirements of § 169.3 can substantially affect the ability of INGAA's members to compete with alternative fuels for service to their customers.

---

[4] Section 7(h) of the Natural Gas Act, 15 U.S.C. § 717f(h) (1976) provides specifically that a natural gas company holding a certificate of public convenience and necessity can acquire necessary rights-of-way through exercise of the right of eminent domain where an agreement with the owner of the property cannot otherwise be reached. The applicability of this Section to rights-of-way across tribal lands has not been specifically addressed by the courts.

It is because of these fundamental and significant interests that INGAA submits this amicus curiae brief in support of the Petition for Writ of Certiorari.

CONSENT OF PARTIES

Amicus is filing this brief with the consent of the parties, whose letters of consent have been filed with the Clerk.

ARGUMENT

The Ninth Circuit's decision has ramifications far beyond the facts of this case. While it is an 1899 Railroad right-of-way statute which is involved here,[1] the regulation if upheld as a valid exercise of the rulemaking authority of the Secretary covers all rights-of-way across Indian lands. It would, therefore, unlawfully delegate to the Indian tribes authority to enable them to preclude new rights-of-way permits or the renewal of rights-of-way permits across Indian lands and, in cases where consent is given, to fix the compensation which must be paid the tribe for such consent. Plainly, the tribe cannot be expected to consent if an agreement on compensation is not reached.

There are a number of right-of-way statutes similar to the 1899 Railroad Right-of-Way Act involved here. These include not only the 1904 Pipeline Right-of-Way Act, but right-of-way acts covering telephone and telegraph lines, power lines, and other facilities servicing the public. *See*, 25 U.S.C. § 319 (1976).

---

[1] 25 U.S.C. § 312-318 (1976).

In certain instances, Congress has conditioned the issuance of rights-of-way permits upon tribal consent.[4] In other cases, however, the right-of-way has been expressly granted by statute, as with the 1899 Act, or the authority has been delegated to the Secretary to issue right-of-way permits and to determine the amount of compensation to be paid for such permits, as is the situation under the 1904 Pipeline Right-of-Way Act. It is submitted that the Secretary cannot lawfully delegate to the Indian tribes the authority to prevent the exercise of the power delegated to him by Congress. *See Cudahy Packing Co.* v. *Holland*, 315 U.S. 357 (1942); *Washington* ex rel. *Seattle Title Trust Co.* v. *Roberge*, 278 U.S. 116, 122-23 (1928); *Eubank* v. *City of Richmond*, 226 U.S. 137, 143-44 (1912). *See also Montana* v. *United States*, 450 U.S. 544, 564 (1981); *United States* v. *Wheeler*, 435 U.S. 313 (1978); *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978).

Whether the Secretary has exceeded his authority in requiring tribal consent for all rights-of-way as provided in 25 C.F.R. § 169.3(a) (1982) is clearly a matter of extreme importance not only to the railroads, pipelines, and the other utility companies affected, but also to the public they serve.

---

[4] For example, the 1948 General Right-of-Way Act requires consent with respect to certain specified Indian tribes. 25 U.S.C. § 324 (1976) Other examples are Act of August 5, 1882, ch. 394, 22 stat. 299; Act of May 30, 1888, ch. 336, 25 stat. 160; Act of May 8, 1890, ch. 198, 26 stat. 102; Act of February 18, 1895, ch. 95, 28 stat. 665.

CONCLUSION

Certiorari should issue so that this Court can review and correct the erroneous decision of the Ninth Circuit.

Respectfully submitted,

JOHN H. CHEATHAM, III
1660 L Street, N.W.
Washington, D.C. 20036
(202) 293-5770

ATTORNEY FOR
Interstate Natural Gas Association of America

APPENDIX

APPENDIX

INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA MEMBERSHIP

Active Membership

Alabama-Tennessee Natural Gas Company
Algonquin Gas Transmission Company
American Natural Resources Company
Black Marlin Pipeline Company
Colorado Interstate Gas Company
The Columbia Gas System, Inc.
Consolidated Natural Gas Company
Continental Resources Company
El Paso Natural Gas Company
Granite State Gas Transmission Inc.
Great Lakes Gas Transmission Company
InterNorth, Inc.
Kansas-Nebraska Natural Gas Company, Inc.
Locust Ridge Gas Company
Michigan Gas Storage Company
Mid Louisiana Gas Company
Mississippi River Transmission Corporation
Mitco Pipeline Company
Natural Gas Pipeline Company of America
Northwest Energy Company
Pacific Gas Transmission Company
Pacific Interstate Transmission Company
Panhandle Eastern Corporation
Ringwood Gathering Company
Southern Natural Gas Company
Tennessee Gas Transmission
Texas Eastern Transmission Corporation
Texas Gas Resources Corporation
Transco Energy Company
United Gas Pipe Line Company
Valero Interstate Transmission Company
Valley Gas Transmission, Inc.
Western Transmission Corporation .

Associate Members

Amoco Production Company
ARCO Oil and Gas Company
Arkansas Louisiana Gas Company
Atlanta Gas Light Co.
The Brooklyn Union Gas Co.
Chevron U.S.A., Inc.
Conoco Inc.
Enstar Petroleum, Inc.
Entex, Incorporated
Exxon Company, U.S.A.
Forest Oil Corporation
Getty Oil Company
Gulf Oil Exploration and Production Company
John H. Hill
HNG Fossil Fuels Company
HNG Oil Company
Kinsey Interests, Inc.
Laclede Gas Company
LGPC Explortion, Inc.
The Louisiana Land & Exploration Company
Marathon Oil Company
Minerals, Inc.
Mitchell Energy & Development Corp.
Mobil Oil Corporation
National Fuel Gas Company
Natural Resources Corporation
Phillips Petroleum Company
Shell Oil Company
Southern California Gas Company
Southern Union Production Company
Sun Gas Company
Union Oil Company of California

Office - Supreme Court, U.S.
FILED
SEP 8 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-180

IN THE

Supreme Court of the United States

OCTOBER TERM 1983

SOUTHERN PACIFIC TRANSPORTATION COMPANY,

Petitioner,

vs.

JAMES G. WATT, ET AL., and WALKER RIVER PAIUTE TRIBE OF NEVADA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE ON BEHALF OF TRANSWESTERN PIPELINE COMPANY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI OF SOUTHERN PACIFIC TRANSPORTATION COMPANY

JAMES W. MCCARTNEY
Vinson & Elkins
First City Tower
Houston, Texas 77002
(713) 651-2324

Attorney for Amicus Curiae Transwestern Pipeline Company

Of Counsel:
KATHLEEN C. LAKE
Vinson & Elkins
First City Tower
Houston, Texas 77002

No. 83-180

In The

Supreme Court of the United States

October Term 1983

Southern Pacific Transportation Company,

Petitioner,

vs.

James G. Watt, et al., and Walker River Paiute Tribe of Nevada,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE ON BEHALF OF TRANSWESTERN PIPELINE COMPANY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI OF SOUTHERN PACIFIC TRANSPORTATION COMPANY

Transwestern Pipeline Company (Transwestern) respectfully submits this amicus curiae brief in support of the Petition for Writ of Certiorari filed by the Southern Pacific Transportation Company (Southern Pacific).

All parties have consented to the filing of this brief, and copies of their consent letters have been filed with the Clerk.

INTEREST OF AMICUS CURIAE

Transwestern is a natural gas pipeline company regulated by the Federal Energy Regulatory Commission under the Natural Gas Act, 15 U.S.C. § 717 (1976). It holds several certificates of

public convenience and necessity issued by the FERC and its predecessor, the Federal Power Commission, authorizing the transportation, sale, and delivery of up to 750,000 Mcf of natural gas for resale and distribution in the Southern California area. Substantial portions of its facilities, including its 30-inch main line, cross lands of the Navajo Nation in New Mexico and Arizona. Its main-line facilities are an integral part of its pipeline system; it cannot serve Southern California without such facilities, and it cannot, as a practical matter, relocate the facilities around tribal lands. Whether it can condemn the necessary rights-of-way across tribal lands under the Natural Gas Act is a matter which has not been decided by the courts.[1]

The permit pursuant to which Transwestern constructed its pipeline system across Navajo lands was for an initial term of 20 years. It has now expired. Transwestern has applied for a new or renewal permit under the provisions of the 1904 pipeline right-of-way statute.[2] That application has been denied by the Acting Area Director of the Bureau of Indian Affairs on the ground that the tribal consent requirement of § 169.3(a) of the Secretary's regulations, 25 C.F.R. § 169.3 (1982), which the Ninth Circuit upholds, had not been satisfied. An appeal under 25 C.F.R. §§ 2.3, 2.19 (1982) is pending before the Board of Indian Appeals.

Transwestern's facilities are presently located on and across the lands of other Indian tribes. And, Transwestern contemplates that extension of its pipeline facilities will involve the need to cross tribal lands in the future. If tribal consent can be imposed as a condition to the construction or maintenance of its

---

[1] The Natural Gas Act, 15 U.S.C. § 717 (1976), authorizes pipeline companies holding certificates of public convenience and necessity to acquire necessary rights-of-way through the exercise of powers of eminent domain.

[2] Act of Mar. 11, 1904, ch. 505, 33 Stat. 65 (codified as amended at 25 U.S.C. § 321 (1976) ("1904 Act")). The text of this statute is contained in the appendix attached to this brief.

pipeline facilities, Transwestern's ability to provide gas service to Southern California and its other customers will be directly affected and seriously impaired. Transwestern, thus, has a substantial interest in this case.

ARGUMENT

There are a number of acts of Congress authorizing the Secretary of Interior to grant rights-of-way for various purposes across Indian lands.[3] Some expressly impose consent requirements.[4] Some do not.[5] Some provide for permanent rights-of-way.[6] Some provide for permits of a limited duration.[7] The consent regulation, section 169.3(a), which the Ninth Circuit upholds as a valid exercise of authority under the 1899 Act,

---

[3] In addition to the 1904 Act and 1899 Act involved in this case, Act of Mar. 2, 1899, ch. 374, 30 Stat. 990 (codified as amended at 25 U.S.C. §§ 312-318 (1976)), see also Act of Mar. 3, 1901, ch. 832, 31 Stat. 1083 (telephone and telegraph lines) (codified at 25 U.S.C. § 319 (1976)); Act of Mar. 4, 1911, ch. 238, 36 Stat. 1253 (power plant and communication facilities) (codified as amended at 43 U.S.C. § 961 (1976)); Act of Feb. 5, 1948, ch. 45, 62 Stat. 17 (general purpose) (codified as amended at 25 U.S.C. §§ 323-328 (1976)).

[4] The 1948 Act provides for consent only with respect to tribes organized under the Indian Reorganization Act of 1934. 25 U.S.C. § 324 (1976). Prior to passage of the 1899 Act, Congress enacted a number of individual railroad right-of-way acts that contained a consent requirement. *See, e.g.*, Act of Aug. 5, 1882, ch. 394, 22 Stat. 299; Act of May 30, 1888, ch. 336, 25 Stat. 160; Act of May 8, 1890, ch. 198, 26 Stat. 102; and Act of Feb. 18, 1895, ch. 95, 28 Stat. 665, *cited in United States* v. *Southern Pacific Transportation Co.*, 543 F.2d 676, 689 n. 20 (9th Cir. 1976).

[5] Neither the 1899 Act (railroads), the 1901 Act (telephone and telegraph lines), the 1904 Act (pipelines), nor the 1911 Act (power plant and communications facilities) contains a consent requirement.

[6] *See, e.g.*, the 1901 Act, 25 U.S.C. § 319 (1976); the 1899 Act, 25 U.S.C. § 312 (1976).

[7] The 1904 Act, for example, provides that a permit shall be issued for a term of 20 years and provides for the issuance of a renewal permit for an additional 20 years. *See also* 43 U.S.C. § 961 (1976) (50 years).

applies indiscriminately to all rights-of-way that the Secretary is authorized to grant across Indian lands. *See* 25 C.F.R. §§ 169.23-169.28 (1982). It has been and, if not invalidated, will be applied to other statutes.

Within the United States, there are millions of acres of Indian lands. Those lands must be and are crossed by pipelines, power lines, railroads, and other utility facilities. It is inconceivable that Congress intended to permit tribal lands to be barriers to interstate utility-type operations, operations providing public service to the citizens of the various states, even assuming it could constitutionally effect such a result. Indeed, by authorizing the Secretary to issue permits for railroads, pipelines, power lines, telephone and telegraph lines, and other facilities, the power of the tribes to exclude such operations is denied by necessary implication *See United States* v. *Wheeler*, 435 U.S. 313, 322-23 (1978); *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 206-08 (1978).

The tribal consent requirement of § 169.3(a) is not merely a "condition" — it is an absolute veto given to the Indians that effectively divests the Secretary of *any* authority to grant rights-of-way disapproved by the tribe. This result is inimical to the public interest and is manifestly contrary to the intent of Congress underlying the 1899 Act and the other statutory provisions that authorize specific grants of rights-of-way for utility and other public purposes, such as the 1904 pipeline act and the 1901 telephone and telegraph line act. *See, e.g.*, 25 U.S.C. §§ 319, 321 (1976). These specific acts and the 1948 general right-of-way act form a comprehensive plan designed by Congress to govern the issuance of rights-of-way across Indian lands. *See Plains Electric Generation & Transmission Cooperative* v. *Pueblo of Laguna*, 542 F.2d 1375, 1380-81 (10th Cir. 1976). The 1899 Act and the other specific right-of-way acts authorize the Secretary to grant rights-of-way for specific purposes, in contrast to the general purpose 1948 Act. Also in contrast to the consent provisions of the 1948 Act, neither the 1899 Act, the

1904 Act, nor the other specific utility purpose acts expressly requires tribal consent as a condition to the grant of such rights-of-way, although Congress has historically indicated an awareness of the distinction between requiring consent and not requiring consent. It did not include an express tribal consent requirement in the 1899 Act and the other specific acts because it did *not intend* the grant of rights-of-way for the public purposes denoted in such acts to be so conditioned. Rather, Congress recognized that the public has a substantial interest in rights-of-way corridors for railroads, oil and gas pipelines, and other utilities, and that this interest may clash with the particular economic interest of the tribe whose lands the railroad, pipeline or other utility must cross. The express language of the 1899 Act (as well as that of the 1904 and the other specific right-of-way acts) permits the Secretary to balance the interests of both the public and the Indians by authorizing the Secretary to grant rights-of-way across Indian lands, without tribal consent, on reasonable terms and conditions that provide for adequate compensation to the tribes and ensure prudent and safe use of the right-of-way.

The balancing of interests permitted under the 1899 Act, the 1904 Act, and the other specific acts is thwarted by the tribal consent requirement promulgated by the Secretary and upheld by the Court of Appeals. The veto given the Indians by the consent requirement holds the railroads, pipelines, and other utilities — as well as the consumers to whom services are provided — hostage to the compensation and other demands of the tribes however extreme and unrelated to the value of the land used or the actual damages incurred. Because a railroad, pipeline, or other utility may not be able unilaterally to abandon service it provides* and because of the essential character of the

---

* For example, Section 7(b) of the Natural Gas Act, 15 U.S.C. § 717f(b) (1976), forbids abandonment of interstate natural gas service without prior federal authorization.

facilities, the Secretary's regulation could require the railroad, pipeline or other utility to pay whatever price the Indians may demand for their consent. Patently in most cases, certainly in Transwestern's case, the option of relocating facilities around tribal lands is not a practical alternative. In most instances, the company's power to condemn is uncertain. *Cf. Plains Electric Generation & Transmission Cooperative* v. *Pueblo of Laguna*, 542 F.2d 1375, 1380-81 (10th Cir. 1976).

Furthermore, the consent regulation violates the principle of law that a delegated, discretionary power cannot be further delegated. *Cf. Cudahy Packing Co.* v. *Holland*, 315 U.S. 357 (1942). The court below seeks to avoid application of this rule of law upon the erroneous conclusion that Indian tribes possess attributes of sovereignty with respect to this question and that redelegation is, therefore, sustainable. Clearly, however, a state could not block or unduly burden the construction and operation of interstate railroad or pipeline facilities, nor could the Secretary arbitrarily refuse to issue a permit for such facilities as authorized by Congress. Whether the Secretary can delegate to the Indian tribes the power to do so is a significant matter that this Court should decide in this case.

Even if the authority to redelegate be assumed, however, the Secretary's action here contravenes well-established law that a proper delegation of power must contain objective guidelines and standards for the exercise of the delegated authority. *Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935); *Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 430-32 (1934). The consent regulation establishes no guidelines to be met by the tribal decision-makers, nor does it subject their decision, in any circumstances, to review by the Secretary. Consequently, the regulation divests the Secretary completely of any authority to approve grants of rights-of-way disapproved by the tribes — however arbitrary, capricious or unreasonable such disapproval may be. The Secretary, far from retaining final authority to approve

rights-of-way grants, is effectively bound by the action or inaction of the tribes.

The Secretary's regulation is thus clearly distinguishable from the delegation upheld in *United States* v. *Mazurie*, 419 U.S. 544 (1975), which authorized Indian tribes to regulate retail liquor outlets on the reservations. In *Mazurie* the Court permitted the delegated authority to be exercised *only* pursuant to a tribal ordinance approved by the Secretary of the Interior. *See also Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130 (1982) (tribal power to impose severance tax on mineral production pursuant to tax approved by the Secretary upheld); *Nance* v. *Environmental Protection Agency*, 645 F.2d 701 (9th Cir.) (delegation of redesignation of air quality standards within reservation pursuant to reclassification approved by the EPA administrator upheld), *cert. denied*, 454 U.S. 1081 (1981).

Unlike situations in which delegation of authority to Indians to regulate external affairs have been upheld, the tribal consent requirement in Section 169.3(a) is wholly without limitation. It does not state that tribal consent may not be unreasonably withheld. It does not require acceptance of reasonable offers of compensation. It does not provide standards for the establishment of reasonable compensation for right-of-way grants. No exceptions are provided. No qualifications are imposed. No right of appeal from the arbitrary withholding of consent or unreasonable demands for payment is provided or contemplated.

CONCLUSION

The questions presented in this case concern issues that are far broader than the private interests of the Southern Pacific and the interpretation of the 1899 Act. The public need for railroads, pipelines, power lines, and like utility-type operations is patent. Whether the Secretary can confer on the Indian tribes the authority to control the issuance of permits for such operations

across tribal lands without regard to the provisions of the particular acts of Congress involved is clearly a matter of sufficient importance to warrant review and decision by this Court.

The petition of Southern Pacific for writ of certiorari to the Ninth Circuit should be granted.

Respectfully submitted,

JAMES W. MCCARTNEY
Vinson & Elkins
First City Tower
Houston, Texas 77002
(713) 651-2324

Attorney for Amicus Curiae
Transwestern Pipeline Company

Of Counsel:

KATHLEEN C. LAKE
Vinson & Elkins
First City Tower
Houston, Texas 77002

APPENDIX

1899 Act

25 U.S.C. §§ 312-318 (1976)

§ 312 Rights-of-way for railway, telegraph, and telephone lines; town-site stations

A right of way for a railway, telegraph, and telephone line through any Indian reservation in any State or Territory, except Oklahoma, or through any lands reserved for an Indian agency or for other purposes in connection with the Indian service, or through any lands which have been allotted in severalty to any individual Indian under any law or treaty, but which have not been conveyed to the allottee with full power of alienation, is granted to any railroad company organized under the laws of the United States, or of any State or Territory, which shall comply with the provisions of sections 312 to 318 of this title and such rules and regulations as may be prescribed thereunder: *Provided*, That no right of way shall be granted under said sections until the Secretary of the Interior is satisfied that the company applying has made said application in good faith and with intent and ability to construct said road, and in case objection to the granting of such right of way shall be made, said Secretary shall afford the parties so objecting a full opportunity to be heard: *Provided further*, That where a railroad has heretofore been constructed, or is in actual course of construction, no parallel right of way within ten miles on either side shall be granted by the Secretary of the Interior unless, in his opinion, public interest will be promoted thereby: *Provided, also*, That as a condition precedent to each and every grant of a right of way under authority of said sections, each and every railway company applying for such grant shall stipulate that it will construct and permanently maintain suitable passenger and freight stations for the convenience of each and every town site established by the Government along said right of way.

(Mar. 2, 1899, ch. 374, § 1, 30 Stat. 990; Feb. 28, 1902, ch. 134, § 23, 32 Stat. 50; June 25, 1910, ch. 431, § 16, 36 Stat. 859.)

§ 313. Width of right-of-way

Such right of way shall not exceed fifty feet in width on each side of the center line of the road, except where there are heavy cuts and fills, when it shall not exceed one hundred feet in width on each side of the road, and may include grounds adjacent thereto for station buildings, depots, machine shops, sidetracks, turn-outs, and water stations, not to exceed two hundred feet in width by a length of three thousand feet, and not more than one station to be located within any one continuous length of ten miles of road.

(Mar. 2, 1899, ch. 374, § 2, 30 Stat. 990; June 21, 1906, ch. 3504, 34 Stat. 330.)

§ 314. Survey; maps; compensation

The line of route of said road may be surveyed and located through and across any of said lands at any time, upon permission therefor being obtained from the Secretary of the Interior; but before the grant of such right of way shall become effective a map of the survey of the line or route of said road must be filed with and approved by the Secretary of the Interior, and the company must make payment to the Secretary of the Interior for the benefit of the tribe or nation, of full compensation for such right of way, including all damage to improvements and adjacent lands, which compensation shall be determined and paid under the direction of the Secretary of the Interior, in such manner as he may prescribe. Before any such railroad shall be constructed through any land, claim, or improvement, held by individual occupants or allottees in pursuant of any treaties or laws of the United States, compensation shall be made to such occupant or allottee for all property to be taken, or damage done, by reason of the construction of such railroad. In case of failure to make amicable settlement with any such occupant or

allottee such compensation shall be determined by the appraisement of three disinterested referees, to be appointed by the Secretary of the Interior, who, before entering upon the duties of their appointment, shall take and subscribe before competent authority an oath that they will faithfully and impartially discharge the duties of their appointment, which oath, duly certified, shall be returned with their award to the Secretary of the Interior. If the referees cannot agree, then any two of them are authorized to make the award. Either party being dissatisfied with the finding of the referees shall have the right within sixty days after the making of the award and notice of the same, to appeal, if said land is situated in any State or Territory other than Oklahoma, to the United States district court for such State or Territory, where the case shall be tried de novo and the judgment for damages rendered by the court shall be final and conclusive.

When proceedings are commenced in court as aforesaid, the railroad company shall deposit the amount of the award made by the referees with the court to abide the judgment thereof, and then have the right to enter upon the property sought to be condemned and proceed with the construction of the railway. Each of the referees shall receive for his compensation the sum of $4 per day while engaged in the hearing of any case submitted to them under sections 312 to 318 of this title. Witnesses shall receive the fees usually allowed by courts within the district where such land is located. Costs, including compensation of the referees, shall be made part of the award or judgment, and be paid by such railroad company.

(Mar. 2, 1899, ch. 374, § 3, 30 Stat. 991; Feb. 28, 1902, ch. 134, § 23, 32 Stat. 50.)

§ 315. Time for completion of road; forfeiture

If any such company shall fail to construct and put in operation one-tenth of its entire line in one year, or to complete its road within three years after the approval of its map of location

by the Secretary of the Interior, the right of way granted shall be deemed forfeited and abandoned ipso facto as to that portion of the road not then constructed and in operation: *Provided*, That the Secretary may, when he deems proper, extend, for a period not exceeding two years, the time for the completion of any road for which right of way has been granted and a part of which shall have been built.

(Mar. 2, 1899, ch. 374, § 4, 30 Stat. 991.)

§ 316. Rights of several roads through canyons

The provisions of section 935 of title 43 relating to the rights of several railroads through any canyon, pass, or defile are extended and made applicable to rights of way granted under sections 312 to 318 of this title, and to railroad companies obtaining such rights of way.

(Mar. 2, 1899, ch. 374, § 6, 30 Stat. 992.)

§ 317. Regulations

The Secretary of the Interior shall make all needful rules and regulations, not inconsistent with sections 312 to 318 of this title, for the proper execution and carrying into effect of all the provisions of said sections.

(Mar. 2, 1899, ch. 374 § 7, 30 Stat. 992.)

§ 318. Amendment or repeal of sections

Congress reserves the right at any time to alter, amend, or repeal sections 312 to 318 of this title or any portion thereof.

(Mar. 2, 1899, ch. 374, § 8, 30 Stat. 992.)

1901 Act

25 U.S.C. § 319 (1976)

§ 319. Rights-of-way for telephone and telegraph lines

The Secretary of the Interior is authorized and empowered to grant a right of way, in the nature of an easement, for the construction, operation, and maintenance of telephone and telegraph lines and offices for general telephone and telegraph business through any Indian reservation, through any lands held

by an Indian tribe or nation in the former Indian Territory, through any lands reserved for an Indian agency or Indian school, or for other purpose in connection with the Indian service, or through any lands which have been allotted in severalty to any individual Indian under any law or treaty, but which have not been conveyed to the allottee with full power of alienation, upon the terms and conditions herein expressed. No such lines shall be constructed across Indian lands, as above mentioned, until authority therefor has first been obtained from the Secretary of the Interior, and the maps of definite location of the lines shall be subject to his approval. The compensation to be paid the tribes in their tribal capacity and the individual allottees for such right of way through their lands shall be determined in such manner as the Secretary of the Interior may direct, and shall be subject to his final approval; and where such lines are not subject to State or Territorial taxation the company or owner of the line shall pay to the Secretary of the Interior, for the use and benefit of the Indians, such annual tax as he may designate, not exceeding $5 for each ten miles of line so constructed and maintained; and all such lines shall be constructed and maintained under such rules and regulations as said Secretary may prescribe. But nothing herein contained shall be so construed as to exempt the owners of such lines from the payment of any tax that may be lawfully assessed against them by either State, Territorial, or municipal authority; and Congress expressly reserves the right to regulate the tolls or charges for the transmission of messages over any lines constructed under the provisions of this section: *Provided*, That incorporated cities and towns into or through which such telephone or telegraphic lines may be constructed shall have the power to regulate the manner of construction therein, and nothing herein contained shall be so construed as to deny the right of municipal taxation in such towns and cities.

(Mar. 3, 1901, ch. 832, § 3, 31 Stat. 1083.)

1904 Act

25 U.S.C. § 321 (1976)

§ 321. Rights-of-way for pipe lines

The Secretary of the Interior is authorized and empowered to grant a right-of-way in the nature of an easement for the construction, operation, and maintenance of pipe lines for the conveyance of oil and gas through any Indian reservation, through any lands held by an Indian tribe or nation in the former Indian Territory, through any lands reserved for an Indian agency or Indian school, or for other purpose in connection with the Indian Service, or through any lands which have been allotted in severalty to any individual Indian under any law or treaty, but which have not been conveyed to the allottee with full power of alienation upon the terms and conditions herein expressed. Before title to rights of way applied for hereunder shall vest, maps of definite location shall be filed with and approved by the Secretary of the Interior: *Provided*, That before such approval the Secretary of the Interior may, under such rules and regulations as he may prescribe, grant temporary permits revocable in his discretion for the construction of such lines: *Provided*, That the construction of lateral lines from the main pipe line establishing connection with oil and gas wells on the individual allotments of citizens may be constructed without securing authority from the Secretary of the Interior and without filing maps of definite location, when the consent of the allottee upon whose lands oil or gas wells may be located and of all other allottees through whose lands said lateral pipe lines may pass has been obtained by the pipe-line company: *Provided further*, That in case it is desired to run a pipe line under the line of any railroad, and satisfactory arrangements cannot be made with the railroad company, then the question shall be referred to the Secretary of the Interior, who shall prescribe the terms and conditions under which the pipe-line company shall be permitted to lay its lines under said railroad. The compensation to be paid the tribes in their tribal

capacity and the individual allottees for such right of way through their lands shall be determined in such manner as the Secretary of the Interior may direct, and shall be subject to his final approval. And where such lines are not subject to State or Territorial taxation the company or owner of the line shall pay to the Secretary of the Interior, for the use and benefit of the Indians, such annual tax as he may designate, not exceeding $5 for each ten miles of line so constructed and maintained under such rules and regulations as said Secretary may prescribe. But nothing herein contained shall be so construed as to exempt the owners of such lines from the payment of any tax that may be lawfully assessd against them by either State, Territorial, or municipal authority. And incorporated cities and towns into and through which such pipe lines may be constructed shall have the power to regulate the manner of construction therein, and nothing herein contained shall be so construed as to deny the right of municipal taxation in such towns and cities, and nothing herein shall authorize the use of such right of way except for pipe line, and then only so far as may be necessary for its construction, maintenance, and care: *Provided*, That the rights herein granted shall not extend beyond a period of twenty years: *Provided further*, That the Secretary of the Interior, at the expiration of said twenty years, may extend the right to maintain any pipe line constructed under this section for another period not to exceed twenty years from the expiration of the first right, upon such terms and conditions as he may deem proper. The right to alter, amend, or repeal this section is expressly reserved.

(Mar. 11, 1904, ch. 505, §§ 1, 2, 33 Stat. 65; Mar. 2, 1917, ch. 146, § 1, 39 Stat. 973.)

1948 Act

25 U.S.C. §§ 323-328 (1976)

§ 323. Rights-of-way for all purposes across any Indian lands

The Secretary of the Interior be, and he is empowered to grant rights-of-way for all purposes, subject to such conditions as he may prescribe, over and across any lands now or hereafter held in trust by the United States for individual Indians or Indian tribes, communities, bands, or nations, or any lands now or hereafter owned, subject to restrictions against alienation, by individual Indians or Indian tribes, communities, bands, or nations, including the lands belonging to the Pueblo Indians in New Mexico, and any other lands heretofore or hereafter acquired or set aside for the use and benefit of the Indians.

(Feb. 5, 1948, ch. 45, § 1, 62 Stat. 17.)

§ 324. Consent of certain tribes; consent of individual Indians

No grant of a right-of-way over and across any lands belonging to a tribe organized under sections 461, 462, 463, 464, 465, 466 to 470, 471 to 473, 474, 475, 476 to 478 and 479 of this title; sections 396 and 473a of this title; and subchapter VIII of chapter 14 of this title, shall be made without the consent of the proper tribal officials. Rights-of-way over and across lands of individual Indians may be granted without the consent of the individual Indian owners if (1) the land is owned by more than one person, and the owners or owner of a majority of the interests therein consent to the grant; (2) the whereabouts of the owner of the land or an interest therein are unknown, and the owners or owner of any interests therein whose whereabouts are known, or a majority thereof, consent to the grant; (3) the heirs or devisees of a deceased owner of the land or an interest therein have not been determined, and the Secretary of the Interior finds that the grant will cause no substantial injury to the land or any owner thereof; or (4) the owners of interests in the land are so numerous that the Secretary finds it would be impracticable to

obtain their consent, and also finds that the grant will cause no substantial injury to the land or any owner thereof.

(Feb. 5, 1948, ch. 45, § 2, 62 Stat. 18.)

§ 325. Payment and disposition of compensation

No grant of a right-of-way shall be made without the payment of such compensation as the Secretary of the Interior shall determine to be just. The compensation received on behalf of the Indian owners shall be disposed of under rules and regulations to be prescribed by the Secretary of the Interior.

(Feb. 5, 1948, ch. 45, § 3, 62 Stat. 18.)

§ 326. Laws unaffected

Sections 323 to 328 of this title shall not in any manner amend or repeal the provisions of the Federal Water Power Act of June 10, 1920 (41 Stat. 1063), as amended by the Act of August 26, 1935 (49 Stat. 838) [16 U.S.C. 791a et seq.], nor shall any existing statutory authority empowering the Secretary of the Interior to grant rights-of-way over Indian lands be repealed.

(Feb. 5, 1948, ch. 45, § 4, 62 Stat. 18.)

§ 327. Application for grant by department or agency

Rights-of-way for the use of the United States may be granted under sections 323 to 328 of this title upon application by the department or agency having jurisdiction over the activity for which the right-of-way is to be used.

(Feb. 5, 1948, ch. 45, § 5, 62 Stat. 18.)

§ 328. Rules and regulations

The Secretary of the Interior is authorized to prescribe any necessary regulations for the purpose of administering the provisions of sections 323 to 328 of this title.

(Feb. 5, 1948, ch. 45, § 6, 62 Stat. 18.)

1911 Act

43 U.S.C. § 961 (1976)

§ 961 Rights-of-way through public lands, Indian, and other reservations for power and communications facilities

The head of the department having jurisdiction over the lands be, and he is, authorized and empowered, under general regulations to be fixed by him, to grant an easement for rights-of-way, for a period not exceeding fifty years from the date of the issuance of such grant, over, across, and upon the public lands and reservations of the United States for electrical poles and lines for the transmission and distribution of electrical power, and for poles and lines for communication purposes, and for radio, television, and other forms of communication transmitting, relay, and receiving structures and facilities, to the extent of two hundred feet on each side of the center line of such lines and poles and not to exceed four hundred feet by four hundred feet for radio, television, and other forms of communication transmitting, relay, and receiving structures and facilities, to any citizen, association, or corporation of the United States, where it is intended by such to exercise the right-of-way herein granted for any one or more of the purposes herein named: *Provided*, That such right-of-way shall be allowed within or through any Indian or any other reservation only upon the approval of the chief officer of the department under whose supervision or control such reservation falls, and upon a finding by him that the same is not incompatible with the public interest: *Provided further*, That all or any part of such right-of-way may be forfeited and annulled by declaration of the head of the department having jurisdiction over the lands for nonuse for a period of two years or for abandonment.

Any citizen, association, or corporation of the United States to whom there was issued, prior to March 4, 1911, a permit for any of the purposes specified herein under any existing law may

obtain the benefit of this section upon the same terms and conditions as shall be required of citizens, associations, or corporations thereafter making application under the provisions of this section.

(Mar. 4, 1911, ch. 238, 36 Stat. 1253; May 27, 1952, ch. 338, 66 Stat. 95.)